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Supreme Court of the United States

OCTOBER TERM, 1978

No. 79-272

ROBERT A. BROWN, THOMPSON H. LANG,
ALBUQUERQUE PUBLISHING COMPANY (N.S.L.)
JOURNAL PUBLISHING COMPANY, a corporation,
JERRY CRAWFORD and WILLIAM C. HUME,
Petitioners,

- vs -

HON. RICHARD B. TRAUB, District Judge,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW MEXICO

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Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT
OF THE STATE OF NEW MEXICO

Petitioners respectfully pray that a Writ of Certiorari issue to review the Mandate of the Supreme Court of the State of New Mexico entered on May 2, 1979.

OPINIONS BELOW

The Supreme Court of the State of New Mexico, in denying Petitioners' requested Writ of Prohibition and in denying Petitioner's Motion for a Rehearing, rendered no formal opinion. Neither was any formal opinion issued by the New Mexico District Court in which the case originated. The orders entered by these Courts in connection with the subject of this Petition are appended as Appendices A, B, C and D. The letter opinion of the New Mexico District Court is appended as Appendix E.

JURISDICTION

The Mandate of the Supreme Court of the State of New Mexico which denied Petitioner's application for a Writ of Prohibition was entered on May 2, 1979. Petitioners timely filed a Motion for Rehearing in accordance with Rule 19 (a) of the New Mexico Rules of Appellate Procedure in civil cases on May 10, 1979. The Supreme Court of the State of New Mexico entered a mandate denying Petitioners' Motion for Rehearing on June 15, 1979.

The jurisdiction of this Court is invoked under 28 U.S.C. §1257(3).

QUESTIONS PRESENTED

1. May this Court grant immediate review of an Order compelling discovery where meaningful appellate review of the propriety of the discovery order may not be had at the termination of the underlying case?

2. What showing must be made by a plaintiff in a libel action in order to compel discovery of the confidential sources of a news gatherer?

(a) Must plaintiff show that his interest in discovery of the information outweighs defendant's interest in preserving the confidentiality of sources?

(b) Must plaintiff persuade the Court that the discovery sought is so essential to the administration of civil justice that the state has a compelling interest in allowing such discovery?

(c) Must plaintiff show that he has taken reasonable steps in an attempt to obtain the desired information from other sources?

STATEMENT OF FACTS AND PROCEEDINGS

On June 13, 1975, William C. Marchiondo instituted a libel action against the corporate publishers of the two daily newspapers in Albuquerque, New Mexico, and various officers and employees thereof. A supplemental Complaint alleging a new cause of action was filed on May 31, 1978.

Mr. Marchiondo, a prominent (as specifically alleged in his Complaint) local attorney, alleged that four items published by one or both of the Albuquerque daily newspapers were defamatory and prayed for damages, both compensatory and punitive, in an amount exceeding, depending upon construction of the *ad damnum* allegations, eight million dollars:

1. On Sunday, November 3, 1974, the Albuquerque Journal, a daily newspaper of general circulation in Albuquerque, published by the defendant, Journal Publishing Company, printed an editorial announcing its support for the Republican candidate in the upcoming gubernatorial election. With respect to the Democratic candidate, the editorial commented ". . . we question his continued association with Charlie Davis and Bill Marchiondo, prominent Democrats adept at maneuvering in the public arena. As a free-lance lobbyist, Davis' business is influence peddling. As a criminal lawyer, Marchiondo thrives by having friends in key places."

2. On October 27, 1974, the Albuquerque Journal published a paid political advertisement submitted by the New Mexico Republican Party in connection with the same election. The advertisement stated that the Democratic candidate had many "cronies" who would be likely to assert undue influence in his administration if he were elected. The article specifically stated that "Jerry Apodaca would

be the kind of governor who would appoint Billy Marchiondo as chairman of the New Mexico Racing Commission. That's why we say he's the man nobody can afford." This advertisement was published shortly afterward by the Albuquerque Tribune, published by defendant, New Mexico State Tribune Corporation. With respect to this cause of action the Albuquerque Tribune filed a Third-Party Complaint against the New Mexican Republican Party. This Third-Party Complaint is not involved in the particular controversy which is the subject of this Petition.

3. On December 26, 1974, the Albuquerque Journal printed the following comment on an appointment to the local district bench.

> The political implications in McBride's appointment bother us, as does his having received financial support in at least one past election from well-known defense attorney, William Marchiondo.

4. On March 26, 1977, the Albuquerque Journal published an article originated by the Phoenix project of the Investigative Reporters and Editors group. The headline of this article was "Organized Crime Showing Interest in New Mexico", and a photograph of Mr. Marchiondo appeared immediately below this headline.

Defendants answered these allegations by admitting publication of the articles in question but they denied that the publications were defamatory, raised the defense of truth as to the published statements or inferences, and asserted that Mr. Marchiondo was a public figure so as to bring the action within the actual malice standard of *New York Times v. Sullivan,* 376 U.S. 254, 11 L.Ed. 2d 686, 84 S. Ct. 710, 95 ALR 2d 1412 (1964).

The case then entered its discovery phase, in which the

questions which are the subject of this Petition arose. Mr. Marchiondo propounded written Interrogatories to various officers and employees of each newspaper requesting, among other things, all sources of information which had been used by the papers in preparing any article, including articles which were not alleged to be defamatory and which were not the subject of the action, which referred to Mr. Marchiondo, either directly or by implication.* In addition, Mr. Marchiondo issued a subpoena *duces tecum* to William Hume, an investigative reporter for the Albuquerque Journal. (Mr. Hume is not at this writing a named defendant; a Motion is presently pending to add Hume as a named defendant.) Mr. Hume was requested to bring with him to a deposition all documents pertaining to Mr. Marchiondo which he had written or investigated for the last five years,

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*** Typical of the interrogatories propounded by plaintiff Marchiondo to the defendants, on August 26, 1977, were:**

No. 27. "Have you ever received any information from any one in any way connected with Seer's Catalogue or Seer's Rio Grande Weekly regarding the plaintiff. If, so, please state:

. . . (3) The name and address of the person who supplied the information."

No. 45. "Please list every article published in your newspaper in which William C. Marchiondo's name was mentioned, either directly or by innuendo; please include a copy of each of said articles in your answer and for each article please state:

. . . g. all sources of information used in researching the article. * * *"

No. 46. List all reporters, investigators or other sources employed by you or known to you who have done research on William C. Marchiondo. For each such source, please state:

(a) His or her name * * *"

No. 44. "Is there a file or files kept specifically on William C. Marchiondo for use by your paper?
*** * * Also state: ' ' '**

(e) Who is responsible for the information contained in each particular document in said file or files."

and any documentation tending to implicate Mr. Marchiondo in any legal activity.

In consultation with Mr. Hume and others, attorneys for the Albuquerque Journal determined that compliance with these broad requests would result in the disclosure of certain sources who had requested that their names not be revealed by the newspaper, although confidential sources were not relied upon with respect to the preparation of the four articles alleged to be libelous. Accordingly, defendants filed objections to the Interrogatories calling for the disclosure of confidential sources, and with respect to the deposition of Mr. Hume, moved for a Protective Order which would have excused Mr. Hume from bringing with him to the deposition any document which revealed the identity of a confidential source and would have limited the permissible subject of oral examination so as to protect the identity of such sources.

In a letter opinion filed January 15, 1979, the District Judge ruled on the Objections to Interrogatories and the Protective Order, denying any requested relief based on a claim of privilege as to confidential sources. The Court subsequently issued Orders specifically directing defendants to answer Interrogatories as to confidential sources and requiring Mr. Hume to produce documents, which implicate confidential sources, at his deposition. Defendants petitioned to the New Mexico Supreme Court for a Writ of Prohibition against the enforcement of these Orders, which was denied. A timely filed Motion for Rehearing on the requested Writ of Prohibition was also denied.

The present standing of the case is this: Defendants are under orders of the Trial Court to comply with the requests of plaintiff for source information. Defendants

have supplied or are in the process of supplying all source information which is not confidential and information as to those confidential sources who have subsequently consented to the disclosure of their identity. A Writ of Prohibition sought by plaintiff in connection with a discovery question unrelated to the subject of this Petition has been argued and is awaiting decision in the New Mexico Supreme Court. Other discovery is proceeding, and has given rise to several pending Motions for Protective Orders and for compelled answers. A hearing on the merits is presently set for September 4, 1979, but, in light of the various unresolved discovery issues, a continuance has been requested by defendants.

CONSTITUTIONAL PROVISIONS INVOLVED

Amendment I

"Congress shall make no law . . . abridging the freedom . . . of the press; . . ."

Amendment II

". . . or shall any state deprive any person of life, liberty, or property, without due process of law; . . ."

REASONS FOR HEARING THIS CASE

This case presents two questions of substantial importance to the legal community and the public generally, one of which is a procedural question, the other is substantive. It is necessary for this Court to act on each of these questions because lower federal and state courts, have, for want of a recent Supreme Court precedent, rendered conflicting decisions, and have given unjust and overboard application to previous decisions of this Court.

The first of these questions, the procedural question, goes to the reviewability (appealability) of the action of the

New Mexico Supreme Court in the present procedural setting, which setting is the review of a discovery Order refusing protection of an asserted newsman's constitutional privilege against disclosure of confidential sources in a civil action.

This Petition, of course, seeks review of a denial of an extraordinary writ, in this case denial of a Writ of Prohibition, and the extraordinary writ was, in turn, sought in the context of a discovery order. Petitioners readily concede that an extraordinary writ is indeed reserved for the extraordinary cases, *Ex parte Fahey,* 332 U.S. 258, 67 S.Ct. 1558, 91 L.Ed. 2041 (1947). THIS IS AN EXTRAORDINARY CASE. It need not be a "cause celebre". Petitioners have urged continuously that they would have no adequate remedy by appeal, that the order of the trial court, in its extraordinary breadth, is an abuse of discretion, all of which is coupled with the fact that the newsman's privilege has never been considered by this Court in the context of civil litigation. Petitioners, therefore, rely upon *Schlagenhauf v. Holder,* 379 U.S. 104, 55 S.Ct. 234, 13 L.Ed.2d 152 (1964), and its progeny, in their attempt to prevent the rape of their asserted Constitutional privilege. For further cases, approving use, to correct discovery order abuses, of an extraordinary writ, see *Hartley Pen Co. v. United States District Court,* 287 F.2d 324 (9th Cir., 1961); *United States v. Hemphill,* 369 F.2d 539 (4th Cir., 1966); *Harper & Row Publishers, Inc. v. Decker,* 423 F.2d 487 (7th Cir., 1970), aff. per curiam, 400 U.S. 348, 91 S.Ct. 470, 27 L.Ed.2d 433 (1971); *Sanderson v. Winner,* 507 F.2d 477 (10th Cir., 1974), cert. den. 421 U.S. 914 (1975); *Heathman v. United States District Court for Central District of California,* 503 F.2d 1032 (9th Cir., 1974).

The jurisdiction of this Court is derived from 28 U.S.C. §1257, which provides for review by appeal or certiorari from "*final judgments* or decrees rendered by the highest court in the state in which decision could be had . . ." The finality reqirement of 28 U.S.C.§ 1257 is subject to the same considerations as the final decision requirement of 28 U.S.C. §1291, governing interlocutory appeals. *New York Times v. Jascalevitch,* .... U.S. ...., 98 S. Ct. 3058 (1978).

Alexander v. United States, 201 U.S. 117 50 L. Ed. 686, 26 S. Ct. 356 (1906), sets forth the general proposition that discovery orders were not "final" judgments so as to be appealable prior to final disposition of the underlying case. The reasoning behind this rule was developed in *Cobbledick v. United States,* 309 U.S. 323, 84 L. Ed. 783 (1940);

> Finality as a condition of review is an historic characteristic of federal appellate procedure. It was written into the first judiciary act and has been departed from only where observance of it would practically defeat the right to any review at all. Since the right to a judgment from more than one court is a matter of grace and not the necessary ingredient of justice, Congress from the very beginning has, by forbidding piecemeal disposition on appeal of what for practical purposes is a single controversy, set itself against enfeebling judicial administration. Thereby is avoided the obstruction to just claims that would come from permitting the harassment and cost of a succession of separate appeals from the various rulings to which a litigation may give rise from its initiation to the entry of final judgment. *Id.* at 325-326 (footnotes omitted).

These considerations of judicial economy and the avoidance of delay and harassment indeed provide a compelling rationale for the application of the finality rule, but the holding of *Cobbledick* does not exclude other considerations.

> Due regard for efficiency in litigation must not be carried so far as to deny all opportunity for the appeal contemplated by the statute. *Id.* at 329.

The specific legal issues in this Petition concern the appealability of a discovery Order requiring, in a libel action, disclosure of newsmen's alleged confidential sources, and the underlying substantive issue is the existence or nonexistence of any privilege against such disclosures. However, the practical issues inherent in the particular factual situation out of which this Petition arises more vividly reveal Petitioner's plight and, in turn, reveal the need for the review here sought. The practicalities arise out of the fact that the discovery ordered was not discovery of sources relied upon in publishing the allegedly defamatory material, rather, the order, in essence, directed discovery of any source ever furnishing any information to the Petitioners (defendants) concerning the libel plaintiff. The practical issues presented for review can, thereto, be stated as follows:

1) Where members of the news media are sued for defamation, are all confidential sources open to discovery regardless of the fact that such confidential sources furnished nothing to the defendants which was relied upon to publish that which is alleged to have been defamatory, and

2) Where the decisions of the various courts of the United States are hopelessly split as to the existence of any First Amendment qualified privilege against disclosure of media confidential sources, must a media defendant subject itself to criminal contempt and default judgment to seek review of an unbridled inquiry into the identity of confidential sources, which sources were not relied upon in alleged defamatory publications?

In short, the practical ramifications of a denial of the instant Petition is to permit any person, criticized in some fashion by the news media, to simply file a multimillion dollar libel action, immediately file a sweeping set of Interrogatories demanding disclosure of the identity of sources of information ever furnished to the libel defendant concerning the plaintiff, regardless of whether relied upon in the allegedly defamatory publication, and immediately force the media defendant into a criminal contempt and default judgment posture by the defendant's refusal to breach its covenant of confidence with its sources.

It is in this context that Petitioners here contend that the requirement of "finality", ordinarily a bar to the appealibility of a discovery Order, should here be held inapplicable under the well established principle that the requirement of finality be given a "practical rather than a technical construction". *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541, 93 L. Ed. 1528, 69 S. Ct. 1221 (1949); *Gillespie v. United States Steel Corp.*, 379 U.S. 148, 13 L.Ed. 2d 199, 85 S.Ct. 308 (1964); *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 40 L. Ed. 2d 732, 94 S. Ct. 2140 (1974).

The spectre of a default judgment for ruinous damages is not an imaginary evil, as amply demonstrated by the recent default judgment entered in Idaho, in a libel case, and as a result of refusal to divulge confidential sources, and for the eye-opening sum of 1.9 million dollars. *Sierra Life Insurance v. Magic Valley Newspapers*, 4 Med.L. Rptr. 1689 (Idaho State District Court 1978). It is well worth noting that in that case the default judgment was entered despite a specific holding that the Plaintiff was a public figure and that plaintiff had utterly failed to demonstrate "constitutional malice". [In the instant case, as is set forth

in the Statement of the Case, supra, the defendants have asserted that the plaintiff is a "public figure" but that issue has not yet been determined by the trial court.]

Petitioners' dilemma is rendered all the more acute by the fact that this Court has never addressed the issue of a qualified newsman's privilege in a civil case, and its decision in a criminal law, grand-jury context, *Branzburg v. Hayes,* 408 U.S. 665, 92 S. Ct. 2646, 33 L. Ed. 2d 626 (1972), has been cited both as a positive denouncement of any such privilege, *Dow Jones & Company v. Superior Court,* 364 Mass. 317, 303 N.E. 2d (1973), including Petitioner's jurisdiction, *Ammerman v. Hubbard Broadcasting, Inc.,* 91 N.M. 250, 527 P. 2d 1258 (1977), and, on the other hand, as the beacon of truth that there is such a privilege, *Hart v. Playboy Enterprises,* 4 Med. L. Rptr. 1616 (D. Kan. 1978); *Mize v. McGraw Hill,* 5 Med. L. Rptr. 1156 (S.D. Tex. 1979).

It is into this sea of uncertainty that Petitioners must apprehensively attempt to navigate. Nor are the shorelines by any means clearly discernible. If caught by the Scylla of *Dow Jones* or *Ammerman* on the one side, the Petitioners face anything from a monstrous default judgment to volunteering themselves to the onus of criminal contempt, before, says the Supreme Court of New Mexico, they can urge before an appellate tribunal that has already decided otherwise, (See *Ammerman, supra*) that the United States Constitution provides a qualified constitutional privilege. Petitioners therefore, by this Petition steer to the opposite shore, engulfed in the mist of *Branzburg,* hoping that they are not in the Straits of Messina at all.

To bar an appeal under the circumstances by the "finality rule", would be to reserve the cloak of the Constitution

to the most audacious or the most [illegible]y, who would risk their criminal-free reputation or [illegible]eir livelihood, or both, in order to assert what they believe, and numerous courts have agreed upon, is a Constitutionally established privilege necessary to a free press and an informed public. To hold that there is a plain and adequate remedy by subjecting itself to a default or to criminal contempt, under these circumstances, where the lawfulness of the conduct has never been defined and is totally immersed in contradictory pronouncements, should provide the framework of great and immediate public concern in which practicalities outweigh the technicalities of any "finality rule" argument.

The practical desirability of permitting an appeal in the context of a constitutional-criminal contempt confrontation has been previously articulated:

> When discovery is compelled over a claim of privilege, the potential injury would seem sufficiently serious to allow interlocutory review. Both the social policy represented by a grant of privilege and the benefit conferred on the privilege-holder are undermined by pretrial procedures in which a person may be forced to give up information without opportunity to test on appeal the validity of his objection. Effective protection of the privilege would seem to outweigh the delay and expense of allowing an appeal. *Developments in the Law-Discovery,* 74 Harv. L. Rev., 940, 994 (1961).

The preceding arguments of Petitioners are addressed to a general desirability of appealability, although couched in terms of the unusual breadth of the discovery order sought to be appealed from and its practical effect of any semblance of privilege. The argument, as suggested by the author of the Harvard Law Review article just quoted, fits a more specifically defined exception to the "finality rule",

which is the so-called "collateral - orders doctrine". Under this doctrine, first announced in *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541, 69 S. Ct. 1221, 93 L. Ed. 1528 (1949), when a trial court order disposes of an issue which is collateral to the subject matter of the litigation and which will expose a person to irreperable injury if appeal is postponed to the final decision, an immediate appeal is permissible.

As to the element of irreperable injury:

> The irreperable injury requirement would appear to be satisfied in the case of orders compelling discovery over a claim of privilege. Developments in the Law-Discovery, *supra,* at 1000.

As to the "collateral" element, this Court has defined collateral orders as:

> Matters embraced in (a) decision (which are) not of such . . . nature as to affect, or to be affected by, decisions of the merits of (the) case. *Cohen v. Beneficial Industrial Loan Corp.*, supra, at 546.

Clearly, the granting of discovery of privileged sources, who were not even established as having been relied upon in publication of the allegedly defamatory matter, cannot reasonably be anticipated as reversible error, should plaintiff prevail in his libel action. In this regard New Mexico has substantially adopted Rule 61 of the Federal Rules of Civil Procedure, as follows:

> Rule 61. Harmless error.
>
> No error or defect in any ruling or order or in anything done or omitted by the court or by any of the parties is ground for granting a new trial or for setting aside a verdict or for vacating, modifying or otherwise disturbing a judgment or order, unless refusal to take such action appears to the court inconsistent with substantial justice. The court at every stage of the proceeding must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties.

The collateral source rule is thus generally understood to have three elements, (1) separability, (2) importance, and (3) urgency. *Grinnell Corp. v. Hackett,* 519 F. 2d 595 (1st Cir. 1795), *cert den.* 423 U.S. 1033, 46 L. Ed. 2d 407, 96 S. Ct. 566 (1975). This is, of course, why Petitioners discuss under this heading both the procedural and the substantive issues, although both partake of the necessary importance and urgency. Each element is here present. The finality rule, if strictly applied as under *Alexander v. United States, supra,* would, in effect, direct Petitioners to seek later relief by appeal, presumably from a contempt citation or a default judgment. The present situation is, therefore, analogous to the finality rule normally observed as a condition precedent to a writ of mandamus. *Bankers Life & Casualty Co. v. Holland,* 346 U.S. 379, 74 S. Ct. 145, 98 L. Ed. 106 (1953). However, where there exists a threat of an invasion of personal rights, coupled with a lack of guiding precedent, or, in effect, a matter of first impression is involved, this Court has not hesitated to set at rest, by accepting appeal, issues of extreme importance to the public and bar. *Schlagenhauf v. Holder,* 379 U.S. 104, 13 L. Ed. 2d 152, 85 S. Ct. 234. Certiorari is peculiarly appropriate where there are clear conflicts among lower courts. *DiBella v. United States,* 369 U.S. 121, 7 L. Ed. 2d 614, 82 S. Ct. 654 (1962). That matters under the First Amendment have been long considered of such importance as to leave them unanswered as intolerable, is well established. *Miami Herald Publishing Company v. Tornillo,* 418 U.S. 241, 94 S. Ct. 2831, 41 L. Ed. 2d 730

(1974). *Mills v. State of Alabama,* 384 U.S. 214, 16 L. Ed. 2d 484, 86 S. Ct. 2831 (1966).

Likewise, to force a criminal contempt citation, or default judgment, as a condition precedent to appealability of an assertion of a First Amendment right should also be viewed as intolerable. *State ex rel Beacon Journal Pub. Co. v. Kainrad,* 46 Ohio St. 2d 349, 348 N.E. 2d 695 (1976). See also, *Sav-On Drugs, Inc. v. Superior Court of Los Angeles County,* 15 Cal. 3d 1, 123 Cal. Rptr. 283, 538 P. 2d 739 (1975).

In summary, the finality rule should not bar review in the present case (a) under the rule of practical rather than technical construction, announced in *Cohen* and *Gillespie, supra,* (b) under the collateral order doctrine of *Cohen, supra,* and (c) under the doctrines of First Amendment first impression importance recognized in *Miami Herald* and *Mills, supra,* or of first impression and importance to the bar and to the public inherent in *Schlagenhauf, supra.*

Petitioner, would, in fact urge adoption of a clear cut rule of appealability of discovery motions, or at minimum, no absolute bar of appealability, where the discovery order sought to be reviewed involves: (a) the assertion of a constitutional privilege against disclosure, and (b) a matter of first impression in this Court, concerning which there is substantial conflict in the lower courts.

Petitioner turns now to the merits in this case.

The possibility of the existence of a qualified testimonial privilege for news gatherers was addressed by this Court for the first and only time in *Branzburg v. Hayes,* 408 U.S. 665, 92 S. Ct. 2646, 33 L. Ed. 2d 626 (1972). This plurality opinion has spawned an extraordinary amount of confusion

among state and federal courts alike in cases involving criminal matters as involved in *Branzburg,* and also in civil cases.

Lower federal and state courts which have attempted to interpret *Branzburg's* holding in the context of civil litigation, particularly libel actions, have reached widely varying results. In *Caldero v. Tribune Pub. Co.,* 98 Idaho 288, 562, P. 2d 791 (1977), the Idaho Supreme Court concluded:

> Therefore, our reading of Branzburg v. Hayes . . . is to the effect that no newsman's privilege against disclosure of confidential sources founded on the First Amendment exists in an absolute or qualified version. The only restrictions against compelled disclosure appear to be at those cases where it is demonstrably intended to unnecessarily harass members of the news media on a broad scale by means of having an unnecessary impact on protected rights of speech, press or association.

On the other hand, the Tenth Circuit Court of Appeals has taken the attitude that an existence of a qualified privilege is "no longer in doubt" after *Branzburg. Silkwood v. Kerr-McGee Corp.,* 563 F. 2d 433 (10th Cir., 1977), at 437.

The divergent, and in fact diametrically opposed approaches in the attempted application of this Court's holding in *Branzburg* impels one to conclude that further guiding light from this Court is sorely required. Petitioner respectfully submits that the expansive interpretation of *Branzburg* as denying altogether the existence of a news gatherer's privilege, as typified by the Idaho Supreme Court's decision in *Caldero, supra,* has created substantial and undesirable inroads into the constitutionally protected freedom of the American press. Accordingly, petitioner prays that this Court use this opportunity to exand upon

its earlier holding in *Branzburg* in order to avert this mischief.

The decision below lets stand an unwarranted infringement of an intrusion into the ability of the news media to vigilantly and effectively gather news, with absolutely no showing that there is an overriding state interest justifying such intrusion and infringement, and with no inquiry into any alternative but to require compelled disclosure of the newsman's confidential source. The New Mexico Supreme Court did not write an opinion explaining its failure to intervene and to prevent the District Court from making such an infringement, except to obliquely suggest that Petitioners had an adequate remedy by appeal, without any attempt to even suggest what appellate avenue it thought adequate.

The starting point for any inquiry into the existence of a qualified news gatherer's privilege against disclosure of confidential sources is *Branzburg v. Hayes,* 408 U.S. 665, 92 S. Ct. 2646, 33 L. Ed. 2d 626 (1972). An examination of the four opinions filed shows that in spite of the fact that this Court voted 5-4 to uphold the compelled disclosure of confidential sources, in the context of a grand jury inquiry, that some qualified privilege against disclosure does exist. Justice White, writing for the plurality, holds that:

> On the records now before us we receive no basis for holding that the public interest in law enforcement and in insuring effective grand jury proceedings is insufficient to override the consequential, but uncertain, burden on news gathering that is said to result from insisting that reporters, like other citizens, respond to relevant questions put to them in the course of a valid grand jury investigation or criminal trial. 408 U.S. at 690-91.

Justice White noted, however, that a newsman's obligation

to appear and testify before a grand jury is not beyond challenge:

> Grant jury investigations, if instituted or conducted other than in good faith, would pose wholly different issues for resolution under the First Amendment. 408 U.S. at 770.

In his concurring opinion, Justice Powell acknowledged the general obligation of news reporters to testify before grand juries, even regarding their confidential news sources. Justice Powell, however, expanded the scope of the First Amendment protection against disclosure of news sources beyond the situation where a grand jury is being conducted in good faith. He noted that:

> The asserted claim to privilege should be judged on its facts by the striking of a proper balance between the freedom of the press and the obligation of all citizens to give relevant testimony with respect to criminal conduct. *Id.* at 710.

Beyond this requirement that, on case-by-case basis, the competing interests of disclosure and confidentiality be balanced, Justice Powell stated that a newsman might seek a motion to quash or a protective order whenever he was:

> . . . called upon to give information bearing only a remote and tenuous relationship to the subject of the investigation, or if he has some other reason to believe that this testimony implicated confidential news source relationships without legitimate need of law enforcement.

Thus, although Justice White's plurality opinion would require that a newsman testify concerning confidential news sources before grand juries, save where the grand jury's investigation is conducted in bad faith, Justice Powell's concurring opinion would accord greater protection against

disclosure by requiring, after the competing interests have been weighed, the showing of sufficiently compelling state interest in disclosure and a showing that the information sought to be disclosed is relevant to the subject of the grand jury's criminal investigation. In these respects, Justice Powell's concurring opinion is similar to Justice Stewart's dissenting opinion, where he urged, as a precondition to disclosure, a showing of: (1) relevance; (2) exhaustion of alternative sources for the information sought; and (3) a compelling state interest. Thus, the fact that *Branzburg* was decided in the context of a grand jury's investigation of a newsman's actual observation of criminal conduct, and the nature of Justice Powell's special concurring opinion, leaves the precedential value of *Branzburg* in civil litigation very uncertain.

Judicial decisions subsequent to *Branzburg,* make it clear the Courts have, in the area of civil litigation, discerned that *Branzburg* does not preclude an inquiry into a qualified privilege. In *Cervantes v. Time, Inc.,* 464 F. 2d 986 (8th Cir., 1972), *cert. den.* 409 U.S. 1125 (1973), a civil libel action wherein plaintiff, the mayor of St. Louis, sought disclosure of defendant's confidential sources, the 8th Circuit Court of Appeals emphasized the limited scope of this Court's holding in *Branzburg*:

> The Court was not faced with and, therefore did not address, the question whether a civil libel suit should command the quite different reconciliation of conflicting interests pressed upon us here by the defense. 464 F. 2d at 993, n.9.

In another civil libel action, *Carey v. Hume,* 492 F. 2d, 631, 635-636 (D.C. Cir., 1974), the District of Columbia Circuit Court of Appeals stated:

> [A]ppellant was content to present the case to us upon the theory that the First Amendment left no room, under any circumstances, for compelling a newsman to indentify his source. That is clearly not the law after *Branzburg* with respect to criminal proceedings, and it appears to us that *Branzburg,* in language, if not in holding, left intact, insofar as civil litigation is concerned, the approach . . . that the court will look to the facts on a case-by-case basis in the course of weighing the need for the testimony in question against the claims of the newsman that the public right to know is impaired.

And, in a footnote:

> Although it is certainly necessary to consider carefully the emphasis in *Branzburg* upon the public interest in the giving of testimony, we do not believe that it automatically controls this case. This is a civil libel suit rather than a grand jury inquiry into crime, and the dispute over disclosure is between the press and the government. This difference is of some importance, since the central thrust of Justice White's opinion for the court concerns the traditional importance of grand juries and the strong public interest in the effective enforcement of the criminal law. Justice White also relied on the various procedures available to prosecutors and grand juries to protect informants and on careful use by the government of the power to compel testimony. Private litigants are not similarly charged with the public interest and may be more prone to seek wholesale and indiscriminate disclosure. 492 F. 2d at 636, n. 6.

In another civil libel action, *Baker v. F & F Investment,* 470 F. 2d 778 (2d Cir., 1972), *cert. den.* 411 U.S. 966 (1973), the Second Circuit Court of Appeals directly addressed the weight to be given *Branzburg* in a civil context:

> Manifestly, the [Supreme] Court's concern with the

> integrity of the grand jury as an investigatory arm of the criminal justice system distinguishes *Branzburg* from the case presently before us. If, as Mr. Justice Powell notes in that case, instances will arise in which First Amendment values outweigh the duty of the journalist to testify even in the context of a criminal investigation, surely in civil cases, courts must recognize that the public interest in non-disclosure of journalists' confidential news sources will often be weightier than the private interest in compelled disclosure . . . 470 F. 2d at 784-785.

In accord with this interpretation limiting the scope of *Branzburg's* applicability, even in the grand jury context, is the case of *Bursey v. United States,* 466 F. 2d 1059 (9th Cir., 1972) Rehearing Denied, 466 F. 2d 1090 (1972). In this case, reporters for the Black Panther Party's newspaper were held in contempt for refusing to answer questions propounded by a federal grand jury. The Ninth Circuit Court of Appeals held that the witnesses could be compelled to answer questions relevant to the subject matters of the criminal investigation for which the witnesses received immunity. The reporters, therefore, were required to testify concerning the presence of illegal weapons at Panther headquarters and other criminal activity which they may have directly observed. The court held, however, that they were not required to answer inquiries about the identity of persons with whom the witnesses were associated either on the newspaper or in the Black Panther party itself, even though the answers to these inquiries "might have something vaguely to do with conduct that might have criminal consequences." 466 F. 2d at 1091.

In so ruling, the court applied a balancing test requiring as a precondition to compel disclosure of the identity of confidential news sources and other associates, a showing of a

compelling state interest, relevance, and exhaustion of alternative sources. The court specifically articulated the evidentiary showing necessary to compel disclosure:

> When the collision [between government activity and First Amendment rights] occurs in the context of a grand jury investigation, the government's burden is not met unless it establishes that the government's interest in the subject matter of the investigation is 'immediate, substantial, and subordinating', that there is a 'substantial connection' between the information it seeks to have the witness compelled to supply and the overriding governmental interest in the subject matter of the investigation, and that the means of obtaining the information is not more drastic than necessary to forward the asserted. 446 F. 2d at 1083.

Moreover,

> [t]he fact alone that the governmental has a compelling interest in the subject matter of a grand jury investigation does not establish that it has any compelling need for the answers to any specific questions. The court must decide whether the government has carried its burden almost question by question before it can compel answers. *Id.* at 1086.

The *Bursey* decision was undoubtedly written prior to this Court's decision in *Branzburg,* for it was released the following day. In its Opinion on the Petition for Rehearing, subsequently filed by the government, the Court stated that although "news gathering was never a real issue here", 466 F. 2d 1090, n. 1, the decision in *Branzburg* is applicable and does not dispense with the need for balancing the competing interests on a case-by-case basis:

> First, *Branzburg, Pappas,* and *Caldwell* are not inconsistent with either our reasoning or the result we have reached. . . .
>
> Although there is some language in Mr. Justice White's

opinion in *Branzburg,* (408 U.S. at 665, 92 S. Ct. at 2646) implying that a grand jury investigation carries with it ingredients that may favor balance for the government as against the First Amendment, the passage does not purport to disavow the balancing standares enunciated in such cases as *DeGregory v. Atty General of New Hampshire* (1966), 383 U.S. 825, 86 S. Ct. 1148, 16 L. Ed. 2d 292; *Gibson v. Florida Legislative Investigation Committee* (1963) 372 U.S. 539, 83 S. Ct. 889, L. Ed. 2d 929, and *Bates v. Little Rock* (1960), 361 U.S. 516, 80 S. Ct. 412, 4 L.Ed. 2d 480 . . . [W]e have concluded that the balance we struck is not impaired by *Branzburg. Id.* at 1091.

In *Hart v. Playboy Enterprises,* 4 Med. L. Rptr. 1616 (D. Kan. 1978), also a libel action, the libel defendants were held to be insulated from disclosure from confidential sources, whose identities were sought in written interrogatories, under an express holding that a qualified privilege exists, unless and until the plaintiff had shown a substantial need for preparation of the plaintiff's case, and inability without undue hardship to obtain the substantial equivalent by other means.

In the recent case of *Mize v. McGraw-Hill,* 5 Med. L. Rptr. 1156 (S.D. Tex. 1979), the trial court after reviewing *Branzburg* and subsequent cases, enumerated reasonable requirements to be met by an allegedly libeled plaintiff before the discovery of confidential sources is compelled:

> It is apparent from the state of this record that Mr. Mize seeks to compel disclosure in this instance as a preliminary discovery matter rather than as a 'last resort'. There is no evidence in the record of attempts by this plaintiff to discover facts which would prove or lead to proof of the required elements of this claim. None of the courts which have ordered disclosure of a confidential news source have done so on the basis of a

> relatively barren record such as this in the form of an 'advance ruling'. Such paramount competing interests as freedom of the press and the plaintiff's right to develop his case cannot be weighed and balanced in a vacuum. There has been no showing of necessity, as required by *Garland* [*v. Torre* 259 F.2d 545 (2n Cir.), Cert. Denied, 358 U.S. 919 (1958)], only plaintiff's unsupported protestations of need which clearly do not justify so drastic an incursion into First Amendment processes as the compulsory disclosure of a news reporter's confidential source. Furthermore, there has been no showing that the identity of a news source goes to the heart of the plaintiff's claim, or that alternative sources had been exhausted. For these reasons, plaintiff's motion to compel will be denied.

On the other hand other jurisdictions, including New Mexico, in the specific context of libel litigation, have concluded that there is no newsmen's confidential source privilege — period. Thus in *Ammerman v. Hubbard Broadcasting, Inc.,* 91 N.M. 250, 572 P.2d 1258 (1977), where four deputy sheriffs suing a radio station for allegedly defamatory radio broadcasts, sought to compel disclosure of identities of sources *whose information was relied upon* in making the broadcast, the Court of Appeals of New Mexico has flatly stated:

> The First Amendment does not grant a broadcaster any privilege, qualified or absolute, to refuse to reveal confidential information which is admittedly relevant to a court proceeding. 91 N.M. at page 257.

To the same effect is *Dow Jones & Company, Inc. v. Superior Court,* 364 Mass. 317, 303 N.E. 2d 847 (1973).

Therefore, in cases specifically involving alleged defamation, and where *defendants'* confidential sources have

been sought, New Mexico,[1] Massachusetts,[2] and Idaho[3] state court decisions have declared that there is no privilege whatsoever, and, therefore, no balancing of interests has been undertaken. To the contrary are decisions from the United States District Court, District of Kansas,[4] the United States District Court, Southern District of Texas,[5] the United States Court of Appeals, District of Columbia Circuit,[6] a Connecticut Superior Court[7] and the California Superior Court[8] which have all determined that a qualified privilege exists. In summary, three jurisdictions have determined that there is no privilege, five jurisdictions have determined otherwise.

Privilege has, of course, been found to exist in favor of non-party newsmen. See e.g. *Winegard v. Oxberger,* 258 N.W. 2d 847 (Iowa 1977); *Gulliver's Periodicals, Ltd. v. Ghas. Levy Cir. Co.,* 455 F.S. 1197 (D.C. N.D. Ill., 1978); *Amato v. Fellner,* 4 Med. L. Rptr. 1552 (Wisc. Dist. Ct. 1978).

In the istant case, unlike the here challenged cases of *Ammerman, Dow Jones* and *Caldero,* the court did not even require that the plaintiff demonstrate that the confidential sources contributed any information even relied upon, much less were quoted or paraphrased, in the allegedly defamatory publication. Rather in the instant case, the plaintiff's interrogatories were directed to any facts defendants had

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(1) Ammerman v. Hubbard Broadcasting, Inc., supra.
(2) Dow Jones & Company, Inc. v. Supreme Court, supra
(3) Caldero v. Tribune Pub. Co., supra.
(4) Hart v. Playboy Enterprises, supra.
(5) Mize v. McGraw-Hill, supra.
(6) Carey v. Hume, supra.
(7) Goldfeld v. Post Publishing, 4 Med. L. Rptr. 1167 (Conn. Superior Ct. 1978).
(8) Rancho La Costa v. Penthouse, 4 Med. L. Rptr. 1564 (Cal. Superior Ct. 1978).

concerning plaintiff, and any source of such facts, regardless of whether any such facts were relied upon or claimed to have been relied upon in publishing the allegedly defamatory materials.

As in *Mize,* there is no evidence in the record of the instant case to indicate that the trial court had any basis on which to balance the interests of petitioner in preserving the confidentiality of its news sources against the benefit to respondent in obtaining the information. There has been no showing that the requested information goes to the heart of the underlying libel action, and no record of any effort made by respondent to obtain the information by any other means. Accordingly, the court should take this opportunity to expressly clarify the principle that news gatherers have a qualified privilege against the disclosure of confidential sources which should be weighed against the interest served by allowing discovery of such sources. It must be made clear that the confidences of a news gatherer will not be breached upon the mere unsupported allegation of an opposing civil litigant that such information is relevant; to preserve the integrity of the First Amendment, the court must take the position that such confidences will be breached only when it can be shown that justice requires such disclosure.

CONCLUSION

For the reasons aforesaid, it is respectfully prayed that a Writ of Certiorari be granted to review the Mandate of the Supreme Court of the State of New Mexico.

RESPECTFULLY SUBMITTED,
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APPENDIX A

IN THE SUPREME COURT OF THE
STATE OF NEW MEXICO

Wednesday, May 2, 1979

NO. 12,488

ROBERT A. BROWN, et al.,
Petitioners,

vs. Original Prohibition Proceeding

HON. RICHARD B. TRAUB,
District Judge,
Respondent.

This matter coming on for consideration by the Court upon petition for writ of prohibition, and the Court having considered said petition and being sufficiently advised in the premises;

NOW, THEREFORE, IT IS ORDERED that petition for writ of prohibition be and the same is hereby denied.

APPENDIX B

IN THE SUPREME COURT OF THE
STATE OF NEW MEXICO

Tuesday, June 12, 1979

NO. 12,488

ROBERT A. BROWN, et al.,
Petitioners,

vs. Original Prohibition Proceeding

HON. RICHARD B. TRAUB,
District Judge,
Respondent.

This matter coming on for consideration by the Court upon motion of Petitioners for a rehearing, and the Court having considered said motion and being sufficiently advised in the premises.

NOW, THEREFORE, IT IS ORDERED that motion of Petitioners for rehearing be and the same is hereby denied.

APPENDIX C

STATE OF NEW MEXICO
COUNTY OF BERNALILLO
IN THE DISTRICT COURT

WILLIAM C. MARCHIONDO,
Plaintiff,

vs. No. CV 75-02838

ROBERT A. BROWN, et al.,
Defendants.

ORDER UPON OBJECTIONS TO
INTERROGATORIES

The objections of Defendants Thompson H. Lang, Robert A. Brown, William C. Hume and Jerry Crawford having come on before the Court, the Court being fully advised in the premises, having considered the arguments of counsel and the memorandum briefs submitted in support, and otherwise being fully advised in the premises, and believing that the objections are well taken in part and not well taken in part, NOW THEREFORE:

IT IS HEREBY ORDERED, DECREED AND ADJUDGED, as follows:

(1) Defendants objections to Plaintiff's interrogatories calling for thoughts, opinions or editorial judgments are sustained pending the U.S. Supreme Court's decision in *Herbert v. Lando,* unless required be ruled upon in the event the trial of this cause occurs prior to the said decision, in which event the Court will rule, upon application by Plaintiff.

(2) Defendants Brown in directed and within fifteen days hereof shall answer Plaintiff's interrogatories numbered 31(d); 32(b); 33(b); 33(c); 35; 53(g); 54; 61(b) and 61(c).

(3) William C. Hume is directed and within fifteen days hereof shall answer Plaintiff's interrogatories numbered 21(b) and 21(e).

IT IS SO ORDERED.

APPENDIX D

STATE OF NEW MEXICO
COUNTY OF BERNALILLO
IN THE DISTRICT COURT

WILLIAM C. MARCHIONDO,
Plaintiff,

vs. No. CV 75-02838

ROBERT A. BROWN, et al.,
Defendants.

ORDER DENYING DEFENDANT WILLIAM C. HUME'S MOTION TO QUASH SUBPOENA DUCES TECUM AND GRANTING MOTION FOR PROTECTIVE ORDER IN PART

The Motion of Defendant William C. Hume to Quash Subpoena Duces Tecum, or for a Protective Order having come on before the Court for hearing; the Court having considered the arguments of counsel and the memorandum briefs, and believing that the Motion to Quash is not well taken and should be denied and that the Motion for a Protective Order is well taken in part, NOW THEREFORE,

IT IS HEREBY ORDERED, DECREED AND ADJUDGED as follows:

(1) That the said Defendant's Motion to Quash is denied;

(2) The Motion for a Protective Order is granted in the following particulars:

(a) The duces tecum portion of the Subpoena shall be limited to times prior to the date of publication of the libelous articles.

(b) No documents shall be produced upon which an attorney-client privilege or work product is claimed, however, they shall be identified sufficiently to alert the Court as to their nature so that an appropriate ruling can be made if necessary. Any questions propounded to Mr. William C. Hume to which objection is made upon this basis, or document to which production is sought and to which

objection is made upon this basis shall be subsequently ruled upon by the Court, if so requested by Plaintiff, after an in camera inspection thereof.

(c) That portion of the Protective Order seeking non-disclosure based on confidential sources is denied.

(d) That portion of the Protective Order seeking non-disclosure based on mental thoughts, opinions or conclusions which led to editorial judgments is granted, without prejudice to the Plaintiff, until the U.S. Supreme Court rules in the case of *Hubert v. Lando,* unless this action proceeds to trial before the case is decided in which event the Court shall rule further.

(e) Defendant Hume shall be required to produce such documents or other requested items as shall be in his possession or under his control.

IT IS SO ORDERED.

APPENDIX E

STATE OF NEW MEXICO
SECOND JUDICIAL DISTRICT
LETTER OPINION OF DISTRICT COURT

January 15, 1979

Re: William C. Marchiondo vs. Robert A. Brown, et al.
Cause No. 75-02838

Gentlemen:

The Court has reviewed the memorandum briefs submitted herein and rules as follows:

Objections to Interrogatories

a) Insofar as interrogatories call for thoughts, opinions and conclusions which led to editorial judgments, the Court will defer ruling until the U.S. Supreme Court rules in the case of Herbert v. Lando, unless required to rule sooner in the event the instant case goes to trial prior to the Herbert v. Londo decision. If counsel cannot agree which interrogatories fit into this category, the Court will conduct a further hearing and make this decision.

b) All objections based on claim of privilege by a newsman not to divulge his confidential sources are denied.

c) The defendant's objections as to the three items claimed to be attorney's work product are sustained, subject to the agreements contained in defendant's brief.

William Hume — Subpoena Duces Tecum

a) The motion to quash is denied.

b) The motion for a protective order is granted in the following particulars:

1. The duces tecum portion of the subpoena shall be limited as to time prior to the date of publication of the alleged libelous articles.

2. No documents shall be produced upon which an attorney-client privilege/or attorney work product is claimed, however, they shall be identified sufficiently to alert the Court as to their nature so that an appropriate ruling can be made, if necessary.

3. Any claimed privilege of non-disclosure based on confidential sources is denied.

4. Any claim of privilege based on mental thought processes forming a basis for editorial judgments shall be subject to the ruling hereinabove made regarding interrogatories.

5. Mr. Hume shall only be required to produce such documents, etc., as shall be in his possession or under his control.

Mr. Romero shall submit a form of order within ten days.

Supreme Court, U. S.
FILED
NOV 9 1979
MICHAEL RODAK, JR. CLERK

IN THE

Supreme Court of the United States

October Term, 1978

No. 79-272

ROBERT A. BROWN, THOMPSON H. LANG,
ALBUQUERQUE PUBLISHING COMPANY (N.S.L.)
JOURNAL PUBLISHING COMPANY, a corporation,
JERRY CRAWFORD and WILLIAM C. HUME,
Petitioners,

-vs-

HONORABLE RICHARD B. TRAUB, DISTRICT JUDGE,
Respondent.

RESPONSE TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW MEXICO

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

NO. 79-272

ROBERT A. BROWN, THOMPSON H. LANG,
ALBUQUERQUE PUBLISHING COMPANY (N.S.L.)
JOURNAL PUBLISHING COMPANY, a corporation,
JERRY CRAWFORD and WILLIAM C. HUME,
Petitioners,

-vs-

HONORABLE RICHARD B. TRAUB, DISTRICT JUDGE,
Respondent.

The underlying action was instituted for libel in the District Court in and for the County of Bernalillo, New Mexico. Petitioners seek a Writ of Certiorari to the New Mexico Supreme Court to review its mandate of May 2, 1979, denying Petitioners' application for a Writ of Prohibition to the Respondent, a New Mexico District Court judge. Plaintiff, William C. Marchiondo, invoking state discovery procedures, propounded written interrogatories to Petitioners Hume and Brown, seeking to discover the factual basis, if any, for allegedly libelous newspaper articles. The Respondent, after having accorded both parties the opportunity to brief and argue the issues, directed the interrogatories be answered. Jurisdiction has been invoked under to 28 U.S.C. Section 1257(3), which provides:

Final judgments or decrees rendered by the highest court of a state in which a decision would be had, may be reviewed by the Supreme Court as follows:

* * *

(3) By writ of certiorari, . . . where any title, right or privilege or immunity is specifically set up or claimed under the Constitution, treaties or statutes of, or commission held as authority exercised under, the United States.

STATEMENT OF THE CASE

There exists no actual controversy on the facts before the Court upon which to premise jurisdiction. Petitioner Hume asserts Certiorari should issue because Respondent directed the production of documents which presumably result in the disclosure of confidential news sources. Mr. Hume argues the Respondent's Order violates First Amendment immunities that inure to the benefit of newsmen in civil libel cases. (Petition, pg. 6; Appendix D, and E, thereto). The pertinent provision of the challenged Order states:

> Defendant Hume shall be required to produce such documents or other requested items as shall be in his possession or under his control. (Appendix C).

As shown by Mr. Hume's deposition (R. pp. 15,16), Mr. Eric Lanphere, counsel for Petitioners here and below, stated:

> With regard to documents, sought by the Subpoena Duces Tecum, it is our position today that all documents sought by the Subpoena are in the custody and control of Mr. T. H. Lang, and are not in the custody or control of the witness, Mr. Hume.

Petitioner Hume testified, (R. pg 159):

> Q. Is it your testimony you brought absolutely nothing, none of the requested items in this subpoena?
>
> A. I brought nothing with me to this deposition.

Mr. Hume has not produced any of the items requested in the Subpoena because he has no custody of the materials. There has been no injury to Hume.

Petitioner Hume next asserts certiorari should issue because Respondent's Order directed answers to Plaintiff's interrogatories numbered 21(b) and 21(c), (Appendix C to the Petition). By filing Supplemental Answers to Interrogatories on July 13, 1979, Mr. Hume complied with the Order. (R. pg. 1).

Petitioner Brown asserts certiorari should issue, because the Respondent directed him to answer Plaintiff's interrogatories numbered 31(d); 32(b); 33(b); 33(c); 35; 53(q); 54; 61(b) and 61(c), (Appendix C, Petition). By Supplemental Answers to Interrogatories filed on July 13, 1979, Mr. Brown complied with the Order, (R. pg. 4).

Petitioners represent at pp. 10, 11 and 14 of the Petition that they confront the spectre of a default judgment for ruinous damages and the onus of criminal contempt. Neither default judgment nor contempt proceedings have been initiated because the Respondent's Orders have been complied with. There is no pending controversy for resolution by this Court.

The New Mexico Rules of Appellate Procedure, Rules 3(c) and 4(d) set forth provisions for interlocutory appeals to the State Supreme Court. Rule 5, N.M. R. Civ. App. sets forth a procedure for a stay of enforcement of the Order or decree appealed from pending disposition by interlocutory appeal. Petitioners failed to invoke those procedures.

ARGUMENT

Point I. *THE JUDGMENT LACKS FINALITY*

For certiorari to issue for review of a state court judgment under 28 U.S.C. Section 1257(3), the judgment must be "final". In *North Dakota Pharmacy Bd. vs. Snyder's Stores*, 414 U.S. 156, 38 L.Ed.2d 379, 94 S.Ct. 407, (1973), Mr. Justice Douglas quoted Mr. Justice Frankfurter in explaining the ends served by the finality requirement of 28 U.S.C. Section 1257:

The finality requirement of 28 U.S.C. 1257 which limits our review of state court judgments, serves several ends:
(1) it avoids piecemeal review by federal courts of state court decisions;
(2) it avoids giving advisory opinions in cases where there may be no real "case" or "controversy" in the sense of Article III;
(3) it limits federal review of state court determinations of federal constitutional issues to have at a minimum federal intrusions in state affairs.

Mr. Justice Frankfurter . . . summarized the requirement by Congress that in appeals from federal district courts as well as in review of state court decisions the judgments be 'final': '. . . only in very few situations, where intermediate rulings may carry serious public consequences, has there been a departure from this requirement of finality for federal appellate jurisdiction. This prerequisite to review derives added force when the jurisdiction of this Court is invoked to upset the decision of a State Court. . . .

The judgment from which review is sought is not "final" because it is devoid of any concrete controversy. Petitioners have submitted to the subpoena and answered the interrogatories. They have waived a full state review by appeal and did not seek a stay either in state court or here, under Rule 27 of the Rules of the Supreme Court, before the answers were made. Petitioners are not confronted with contempt proceedings. Compare, *Garland vs. Torre*, 259 F.2d 545, (2d Cir. 1958), *cert. denied*, 358 U.S. 910, 79 S.Ct. 237, 3 L.Ed.2d. 231, (1959). Neither are Petitioners confronted with a potential default judgment for a failure to comply. Compare, *Sierra Life Insurance vs. Magic Valley Newspapers*, 4 Med.L.Rptr, 1689, (Idaho District Court 1978), cited by Petitioners at pg. 11, of the petition. Petitioners have chosen not to "enter the Straits of Messina" as they put it, by complying

with Respondent's Orders. In New Mexico, as in other jurisdictions, the extraordinary Writ of Prohibition is limited to instances in which there is no adequate remedy by appeal or where there exists a threat of immediate and irreparable injury. See *State ex rel. Serna v. Hodges*, 89 N.M. 351, 552 P.2d 787 (1976). Under the principles of substantive New Mexico law, such writs are not curative in nature, nor are they a substitute for appeal. *State ex. rel. Alfred vs. Anderson*, 87 N.M. 106, 529 P.2d 1227, (1974). By not appealing in the state forum, and electing compliance, Petitioners have eliminated any actual "case" or "controversy" between the parties, within the meaning of the final judgment rule of 28 U.S.C. 1257. In *Aetna Life Insurance Co. vs. Haworth*, 300 U.S. 227, 81 L.Ed. 617, 57 S.Ct. 461, (1937), Chief Justice Hughes explained:

> . . . A justifiable controversy is thus distinguished from a difference or dispute of a hypothetical or abstract character; from one that is academic or moot. . . . It must be a real and substantial controversy admitting of specific relief through a decree of a conclusive character, as distinguished from an opinion advising what the law would be upon a hypothetical state of facts . . .

If certiorari issues, this Court's decision will be advisory since the asserted legal issues do not exist. If the state court is reversed, what is the relief? That Plaintiff return Petitioners their supplemental answers to interrogatories? By not appealing in the State system, Petitioners themselves have foreclosed their only legitimate and effective remedy.

Petitioners suggest at page 12, that an appeal in the state system would have been futile in view of the New Mexico Court of Appeals decision in *Ammerman vs. Hubbard Broadcasting, Inc.*, 91 N.M. 250, 572 P.2d 1257, (Ct. App. 1977), *cert. den.*, 91 N.M. 249, 572 P.2d 1257, *cert. den.* 436 U.S. 906, 56 L.Ed.2d 404, 98 S.Ct. 2237, (1978), in which the intermediate New Mexico Appeals Court held that the First

Amendment to the United States Constitution did not grant a broadcaster a qualified or absolute privilege to refuse disclosure of confidential information, admittedly relevant to a civil defamation action. That an appeal would have been futile is a hypothication, of the type this Court in *United Public Workers v. Mitchell*, 330 U.S. 75, 91 L.Ed.2d. 754, 67 S.Ct. 556, (1954) stated, is simply "not enough".

POINT II. *THE STATE JUDGMENT BELOW TURNS ON A QUESTION OF FACT CORRECTLY DETERMINED BY A STATE COURT, NOT ON A CONTROLLING QUESTION OF FEDERAL LAW.*

It is established that the Court will not review a state order, where it turns on a question of fact and not on a controlling question of federal law, *Mammouth Mining Co. v. Grand Cent. Mining Co.*, 213 U.S. 72, 53 L.Ed 702 129 S.Ct. 413, (1909). That principle has direct application to the Petition.

Petitioners assert a constitutionally mandated evidentiary "balancing test", or qualified privilege similar to that applied in *Mize v. McGraw Hill*, 82 FRD 475, (S.D. Tex. 1979); C.f. *Adams v. Associated Press*, 46 FRD 439, (S.D. Tex. 1969). *Mize, supra*, was an action brought in federal district court upon diversity jurisdiction for libel. Plaintiff propounded interrogatories seeking disclosure of information provided Defendants. Two years after the interrogatories were propounded, Mize moved to compel answers. The Court denied the motion, because of the Plaintiff's lack of diligence and the absence of showing of alternate efforts to obtain the information in deference to a judicial policy grounded upon general First Amendment considerations.

Assuming, without conceding, that the exercise of a state trial judge's discretion to control and direct discovery in a libel case is controlled by constitutional considerations, Petitioners concede at

pp. 27 that there is no record in the instant actions to indicate whether such a "balancing test" was performed. It is just as likely as not that Respondent did weigh or "balance" the need of the plaintiff to discover the information sought with due consideration to the nature of his claim and the posture of the case as opposed to any hardship that would attach to Petitioners. The record upon which review is sought is devoid of any facts showing or tending to show Respondent failed or refused to consider the relevancy of the information sought or its accessability from alternate sources.

POINT III. *CONTRARY TO THE ASSERTION OF PETITIONERS, THE DECISIONS OF THE COURTS ARE CONSISTENT AND THERE IS NO DIVERSITY OF OPINION ON THE ISSUE.*

Petitioners assert that Plaintiff Marchiondo is a "public figure". That issue is yet unresolved. If the plaintiff is a "public figure", he must prove the publications were made with "actual malice", *viz.* by proof of the knowing publication of untruth, or with reckless disregard, *New York Times vs. Sullivan*, 376 U.S. 254, 11 L.Ed.2d 686, 84 S.Ct. 710, (1964). If plaintiff is not a "public figure," it is constitutionally incumbent to prove fault or negligence as a predicate to the award of damages. See, *Gertz vs. Robert Welch, Inc.*, 418 U.S. 323, 347, 41 L.Ed.2d 789, 94 S.Ct. 2997, (1974) and *Herbert v. Lando*, _____ U.S. _____ 60 L.Ed.2d 115 at 123, 99 S.Ct. 1635, (1979). This court has expressly recognized that evidence showing, or tending to show, publication without a factual basis, or upon information obtained from sources of questionable credibility, is evidence central to a libel plaintiff's burden of proofs, regardless of the test. See, *Lando, Gertz* and *Curtis Publishing Co. v. Butts*, 388 U.S. 130, 18 L.Ed.2d 1094, 87 S.Ct. 1975, (1967).

Petitioners assert that the decisions of the courts are hopelessly split on the issue of the asserted First Amendment immunity to a plaintiff's discovery in libel action. The cases reveal the opposite. Were this Court to grant certiorari and elevate to a constitutional plane the asserted evidentiary privilege, the cases would be thrust into diversity.

Initially, the Court's decisions in *Branzburg v. Hayes, In Re Pappas and U.S. vs. Caldwell*, 408 U.S. 665, 33 L.Ed.2d, 92 S.Ct. 2646, (1972); *Zucker v. The Stanford Daily, et al.*, 436 U.S. 547, 99 S.Ct. 232, 56 L.Ed.2d 525, (1978) and *Herbert vs. Lando, supra*, have declined to elevate to a constitutional status, asserted First Amendment privileges against disclosure by newsmen. Petitioners seek to distinguish that application of those cases since for the most part, they addressed disclosure in criminal as opposed to civil litigation.

The cases directing disclosure of a newsman's sources in defamation cases are long standing, and consistent with settled constitutional doctrine. *Garland v. Torre*, 259 F.2d 545, (2nd Cir. 1958), *cert. den.* 358 U.S. 910, 79 S.Ct. 237, 3 L.Ed. 231, (1958) is one of the first to address the issue. Judy Garland instituted a defamation action for a C.B.S. Radio program written by Mrs. Torre. Mrs. Torre attributed the defamatory remarks to a C.B.S. executive whom she refused to identify in discovery. The trial court declined to hold that disclosure was foreclosed by virtue of a First Amendment privilege and directed discovery because the information "went to the heart of plaintiff's claim". When defendant refused, she was held in contempt. On appeal from the contempt citation, then Circuit Judge Stewart, upheld the trial court:

> If an additional First Amendment liberty—the freedom of the press—is hereby involved, we do not hesitate to conclude that it too must give place under the Constitution to a paramount public interest in the fair administration of justice.
> 259 F.2d 545 at 549.

Carey vs. Hume, 492 F.2d 631, (D.C. Cir. 1974) *cert. den.* 417 U.S. 938, (1974), cited by Petitioners, is additional illustration of the consistency of the decisions. *Carey, supra*, was a defamation action. The U.S. District Court directed newsmen who were parties to the action to reveal the names of alleged confidential sources. In sustaining the order to disclose, the Court stated:

> We reject the only contention made to us by the appellant, and that is, or there should be, an absolute First Amendment barrier to appellant's disclosure by a newsman of his confidential sources under any circumstances. This was not, in our view, the law before *Branzburg*, and it is certainly not the law after . . . 492 F.2d 631 at 634.

In those cases in which disclosure of newsman's sources has been refused, the factual patterns were materially different. In personal injury and products liability cases, in which neither the newsman, nor his newspaper, were parties, the Courts (although not uniformly) have generally ruled against disclosure. *Apicella vs. McNiel Laboratories, Inc.*, 66 FRD 78, (1975) is illustrative. There plaintiff sought recovery for permanent injuries allegedly sustained as the result of defendant's improper drug manufacture. Plaintiff deposed the editor of a medical journal in which an article critical of defendant's drug appeared, and sought the disclosure of the identity of the physicians who contributed to the article. In refusing to direct disclosure the Court stated:

> In a libel case, unlike other civil actions, the reporter or publisher is a party to the suit. Moreover, the identity of the source may be crucial. . . . No absolute rule of privilege protects newsmen. Nevertheless the *policy* protecting news reporters' sources is sufficiently close to a privilege to warrant exclusion from discovery in every instance. (Emphasis added), 46 FRD 78 at 81 and 83.

Baker vs. F & F Investment, Inc., 470 F.2d 778, (2d Cir.

1972) *cert. den.* 411 U.S. 966 (1973), cited by Petitioners, is likewise illustrative of the lack of diversity of opinions addressing the issue. There, plaintiffs sought relief under the Civil Rights Act for discrimination in the sale of housing. Plaintiffs sought to compel the disclosure of the sources of information utilized by non-party newsmen in an article published ten years earlier in the Saturday Evening Post about blockbusting. The Court, in refusing to direct disclosure, stated:

> Although it is safe to conclude, particularly after the Supreme Court's decision in *Branzburg* . . . that federal law does not recognize an absolute or conditional journalist's testimonial privilege, neither does federal law require disclosure by confidential sources in each and every case, both civil and criminal in which the issue is raised. 470 F.2d 778 at 781.

See also, *Silkwood vs. Kerr-McGee*, 536 F.2d 433, (10th Cir. 1977) (disclosure from non-party newsman in wrongful death action denied); *Loadholtz vs. Fields*, 389 F.Supp. 1229. (M.D. Fla. 1975) (disclosure from non-party newsman denied in civil rights lawsuit); *Gilbert vs. Allied Chemical Corporation*, 411 F.Supp. 505, (E.D.Va. 1976) (disclosure request of non-party newsmen in personal injury action denied). In accord, see *U.S. vs. Liddy*, 354 F.Supp. 208, (D.C. 1972) *Farr vs. Pritchess*, 552 F.2d 464, (9th Cir. 1975); *Anderson vs. Nixon*, 444 F.Supp. 1195 (D.C. 1974), and *In Re Grand Jury Empaneled January 21, 1975*, 841 F.2d 373, (3rd Cir. 1976).

What the cases hold, consistently, is that disclosure by newsmen of sources is dependent upon the circumstances of the case. In a libel action, disclosure is appropriate. In other types of actions where the need for disclosures is tangential to the issue, in deference to a judicial policy protective of the press disclosure will generally not be compelled.

The state cases that have resolved the issue in both result and analysis are consistent with the federal decisions. Disclo-

sure is directed where the sources pertain to the factual basis upon which defamatory publications are based. See, e.g., *Caldero v. Tribune Publishing Co.*, 98 Id. 288, 562, P.2d 791, *cert. den.* 98 S.Ct. 418, (1977), *State vs. Buchanon*, 250 Or. 244, 436 P.2d 229, (1978); *In Re Goodfather's Appeal*, 45 Haw. 317, 367 P.2d 472, (1961); *Dow Jones vs. Superior Court*, 364 Mass. 317, 303 N.E.2d 847, (1973), *Farr vs. Superior Court*, 22 Cal. App. 3rd. 60, 99 Cal. Rptr 342, (1971), and *Ammerman vs. Hubbard Broadcasting Co.*, 91 N.M. 250, 572, P.2d 1257, (1977). *cert. den.*, 436 U.S. 906.

Petitioner's reliance upon *Time vs. Cervantes*, 464 F.2d 986, (8th Cir. 1972), *cert. den.* 409 U.S. 1125, (1973), to establish a diversity of opinion is misplaced. The dispositive issue in *Times, supra*, was the propriety of summary judgment granted in favor of Time Magazine, prior to the completion of the plaintiff's discovery.

CONCLUSION

The proper function of certiorari and review by this court is to settle important federal issues, not to settle factual issues. The state trial court fairly decided the propriety of disclosure. The record is devoid of any reference indicating that the Respondent did not fairly consider the propriety of disclosure, as opposed to sustaining Petitioner's objections to interrogatories. Likewise, there is no "controversy" or "case" upon which to impart the finality predicate to invoking the Court's jurisdiction under 28 U.S.C. 1257(3).

It does not help the Petitioner to observe that whether newsmen in defamation cases have a qualified evidentiary privilege against disclosure, is an issue that has never been resolved by this Court. There is no reason why it should be. The fact that a given question has never been resolved by the U.S. Supreme Court has never been a recognized basis for granting certiorari. Nor does the point that the issue might

arise once again in another libel suit, require resolution of the purported constitutionally conferred privilege here asserted. In the first place, there is no real conflict between the various state and federal cases on this issue, nor is there any likelihood that one will arise in the future.

The only real question raised by the Petitioners turns on the particular facts of this case alone, and is of interest only to the parties to it. In essence, Petitioners ask this Court to make a third review, to see if it can find what two previous courts have utterly been unable to find. This Court has held such fact-canvassing is not a task to be served by the grant of certiorari: "We do not grant certiorari review records and discuss specific facts", *United States vs. Johnson*, 221 U.S. 488, 55 L.Ed. 823, 31 S.Ct. 627, (1925). Moreover, the rulings of inferior courts are uniformly treated with and accorded great weight. In the present case, Petitioners seek the resolution of issues which do not arise from the facts of this case. Certiorari, therefore, should be denied.

Respectfully submitted,

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Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 79-272

ROBERT A. BROWN, THOMPSON H. LANG, ALBUQUERQUE PUBLISHING COMPANY (N.S.L.) JOURNAL PUBLISHING COMPANY, a corporation, JERRY CRAWFORD and WILLIAM C. HUME,
Petitioners,

vs.

HON. RICHARD B. TRAUB,
District Judge,
Respondent.

REPLY TO BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW MEXICO

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REPLY TO BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW MEXICO

ARGUMENT

I

REPLY TO POINT I OF BRIEF IN OPPOSITION

Under Point I in the Brief in Opposition to Petitioners' Petition for a Writ of Certiorari (which Respondent denominates as his "Response"), the Respondent in the caption states "The Judgment Lacks Finality".

Under Point I, however, what the Respondent actually argues is not that the Judgment in question lacks finality,

rather the Respondent argues that that which had been ordered in the Judgment in question is *moot,* because the defendant Petitioners, and Petitioner Hume, had voluntarily revealed all newsmen's confidential sources that the Judgment in question had ordered the Petitioners to reveal.

More specifically, the Respondent argues that all confidential sources have been revealed as demonstrated by the fact that:

(1) Defendant Brown had, on July 13, 1979, filed supplementary answers to interrogatories numbered 31(d); 32(b); 33(c); 35; 53(g); 54; 61(b) and 61(c), as Ordered in the "Order Upon Objections to Interrogatories" set forth as Appendix C to the Petition before this Court.

(2) Petitioner Hume (still not made a defendant to this lawsuit) had, also on July 13, 1979, answered interrogatories 21(b) and 21(e), which were also required to be answered by the said Appendix C, and

(3) Petitioner Hume, as to documents listed in the subpoena duces tecum for his deposition, had indicated personally and through his deposition attorney, that all documents listed in the subpoena duces tecum were in the care, custody and control of the President of the defendant newspaper company, Mr. T. H. Lang.

So that this Court will know what the interrogatories referred to above asked, what the original answers and objections were and what the supplemental interrogatory answers added, these original and supplemental answers (which contain the interrogatory questions) are attached hereto (continuing the appendix designations of the original Petition) as Appendix F (Brown original answers to second interrogatories), Appendix G (Brown supplemental

answers to second interrogatories), Appendix H (Hume supplemental answers), respectively.

It is appropriate to reiterate at this point that the plaintiff's Complaint, filed June 13, 1975, and supplemental Complaint, filed May 31, 1978, allege as libelous four (4) separate editorials or articles, appearing on four (4) separate dates, viz:

(1) An editorial published on November 3, 1974, relating to a gubernatorial election, which stated that plaintiff Marchiondo was "adept at maneuvering in the public arena", and that "(A)s a criminal lawyer, Marchiondo thrives by having friends in key places."

(2) A paid political advertisement published on October 27, 1974, entitled "Cronies", which stated that "Jerry Apodaca would be the kind of governor who would apppoint Billy Marchiondo as chairman of the New Mexico Racing Commission."

(3) An editorial published on December 26, 1974, which stated, regarding a judicial appointment, that "(T)he political implications in McBride's appointment bother us, as does his having received financial support in at least one past election from well-known defense attorney, William Marchiondo"; and.

(4) An article published on March 26, 1977, entitled "Organized Crime Showing Interest in New Mexico", with a photograph of plaintiff Marchiondo published immediately below this headline. (See Statement of Facts and Proceedings, original Petition, pp. 3,4.) This Article, published on March 26, 1977, will be referred to *infra*, as the "Fourth Article."

Going back, for the moment, to the answers, objections

and supplemental answers to written interrogatories singled out by Respondent in Respondent's Brief in Opposition, the interrogatories to Petitioner Hume so singled out, related only to one source, a Don Devereaux, who Petitioner Hume, in answer to interrogatory 21(b), specifically states:

> "(b) After consultation with Mr. Devereaux, and with *his consent to reveal it*, I have received items from Mr. Devereaux." (Appendix H)

With regard to the supplemental answers to interrogatories filed by defendant Brown, they also revealed the prior confidential source, Don Devereaux. (Appendix G.)

The interrogatories supplementally answered by Robert A. Brown were directed, in part, to source information related to the truth of the matters published in the fourth article, referred to above, relating to "organized crime showing an interest in New Mexico". The supplemental answers to interrogatories answered by William C. Hume were *not* directed to the "organized crime showing interest in New Mexico" article. It is with regard to the fourth article that confidential source problems exist, and, more specifically, there are source problems existing with regard to the fourth article, regarding sources who furnished information relative to the contents of the fourth article *after* that article was published, the date of publication being, as indicated above, on March 26, 1977.

Respondent's argument would, therefore, be that having obtained the consent of a confidential source to reveal the identity of that source, the issue as to forced disclosure of confidential sources has become moot. That argument would be dispositive of the present Petition if, and only if, Mr. Don Devereaux had been the only confidential source

whom Petitioners had gone to the Supreme Court of New Mexico and to the Supreme Court of the United States in order to protect. Mr. Devereaux is *not* the only source sought to be protected. Should there exist any doubt as to this fact, the Affidavit of Mr. William C. Hume is attached to this Reply Brief as "Appendix I" and is incorporated herein by reference.

The real problem, which necessarily prompted the filing of this Petition for a Writ of Certiorari, and which Respondent's attorneys would, apparently, seek to ignore out of existence, is the simple fact that the only appellate court decision in New Mexico, *Ammerman v. Hubbard Broadcasting, Inc.*, 91 N.M. 250 572 P.2d 1258 (1977), which has ruled on the precise issue of the existence or non-existence of a First Amendment qualified privilege for newsmen's confidential sources in a defamation action, has distinctly and clearly ruled that no such privilege exists, and the Respondent Trial Judge has specifically applied this decision to this case.

> "The First Amendment does not grant a broadcaster any privilege, qualified or absolute, to refuse to reveal confidential information which is admittedly relevant to a court proceeding." Id., 91 N.M. 250, 257.

Respondent's attorneys have relied upon the *Ammerman* case every inch of the way, in the trial court, in the Supreme Court of New Mexico, and in this Court. (See Brief in Opposition, 5, 11.) The trial court did not limit its ruling to Mr. Don Devereaux. It stated, first in its opinion letter to counsel, and then in the Order which is the subject of this appeal, as follows:

> "All objections based on claim of privilege by a newsman not to divulge his confidential sources are denied.
> * * *

Any claimed privilege of non-disclosure based on confidential sources is denied. (Appendix E to Petition.) That portion of the Protective Order seeking non-disclosure based on confidential sources is denied." (Appendix D to Petition.)

What is true is that plaintiff's attorneys have not at this writing placed any defendant or Petitioner Hume in a contempt of court position, nor have plaintiff's attorneys obtained a default judgment against any Petitioner. Plaintiffs have exactly the broad ruling they want from the trial court, and by the strategem of holding back in the weeds on seeking forced disclosure of sources relative to the fourth article published, until such time as Petitioners would have no time to appeal a default judgment (the trial court has stated that the case will come on for trial in March, 1980), the plaintiff's attorneys assert, with child-like innocence, that the issue is "moot".

If the issue is moot, why then would plaintiff's attorneys have pending at this very moment a Motion to Compel Answers to Oral Deposition of Gerald J. Crawford, the editor of the defendant newspaper. In that Motion, filed October 19, 1979, and relating to a deposition taken on August 31, 1979, the precise issue of a continued refusal to reveal confidential sources has been raised. (See Motion to Compel Answers to Oral Deposition of Gerald J. Crawford, with specific reference to lines 15-20, p. 131, and the notice setting this matter for hearing on December 19, 1979, attached as Appendix J.)

Why, if the question of confidential sources is moot, would plaintiff's attorney on August 30, 1979, at a deposition of Petitioner William C. Hume, state:

"Mr. Romero: There is no stay in any order of the District Court in this case denying any asserted privilege based on the confidential sources of a newsman and I would like that shown on the record." (See Appendix L, attached to this Reply Brief.)

And then why would the plaintiff's attorney at that deposition, in addition to general attempts to probe sources, proceed to ask Mr. Hume if he had ever spoken to or otherwise received any information from members of the office of the United States Attorney of New Mexico, the United States Attorney for New York, the United States Attorney for Colorado, the United States Attorney for Nevada, the Department of Justice (Washington, Louisiana, California), the Federal Bureau of Investigation, the New Mexico State Police, the (New Mexico) Governor's Organized Crime Commission, the Albuquerque, New Mexico Police Department, the New Mexico Attorney General's office, the Nevada Gaming Control Commission, etc. (See Affidavit of William C. Hume, previously attached hereto as Appendix J.)

It is abundantly clear that plaintiff's attorneys regard the issue of confidential sources as anything but moot.

The real threshhold question, which the language of Respondent's Point I would indicate they would address, but which Respondent really did not address, is whether there is a justicible issue before this Court where the Trial Court has emphatically declared that no privilege against disclosure of sources exists, the Trial Court has ruled that all confidential sources will be divulged and where there has been a refusal to divulge sources, but where there has as yet been no contempt citation or a default judgment entered. Petitioners recognized this as a significant issue in whether this Court would grant certiorari when initially filing their Petition.

"This case presents two questions of substantial importance to the legal community and the public generally, one of which is a procedural question, the other is substantive. * * *

The first of these questions, the procedural question, goes to the reviewability (appealability) of the action of the New Mexico Supreme Court in the present procedural setting, which setting is the review of a discovery Order . . ." (Petition for Writ of Certiorari, pp. 7, 8.)

Petitioners will not seek to restate their entire original brief, but refer the Court to the summary, at page 16 of the original Petition:

"In summary, the finality rule should not bar review in the present case (a) under the rule of practical rather than technical construction, announced in *Cohen*[1] *and Gillespie*[2], supra, (b) under the collateral order doctrine of *Cohen*, supra, and (c) under the doctrines of First Amendment first impression importance recognized in *Miami Herald*[3] and *Mills*[4], *supra*, or of first impression and importance to the bar and to the public inherent in *Schlagenhauf*[5], *supra*."

Petitioners again respectively urge this Court to establish the principles necessary to guide libel litigants in the area of asserted newsmen's privilege by granting certiorari without the requirement that a newsman suffer default or criminal contempt, in order that this Court may settle this area of grave concern to all First Amendment media representatives.

---

[1]*Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541, 69 S.Ct. 1221, 93 L.Ed. 1528 (1949)

[2]*Gillespie v. United States Steel Corp.*, 379 U.S. 148, 85 S.Ct. 308, 13 L.Ed.2d 199 (1964)

[3]*Miami Herald Publishing Company v. Tornillo*, 418 U.S. 241, 99 S.Ct. 2831, 41 L.Ed.2d 730 (1974)

[4]*Mills v. State of Alabama*, 384 U.S. 214, 16 L.Ed.2d 484, 86 S.Ct. 2831 (1966)

[5]*Schlagenhauf v. Holder*, 379 U.S. 104, 85 S.Ct. 234, 13 L.Ed.2d 152 (1964)

II

REPLY TO POINT II OF BRIEF IN OPPOSITION

In Point II of the Brief in Opposition, attorneys for Respondent seem to be saying that because the record fails to indicate whether the trial court applied the balancing test which Petitioners have urged is constitutionally mandated, who knows but what the trial Judge may have subjectively applied such a test. It would be more worthwhile to attempt to plow the ocean than to waste this Court's time attempting to answer this contention.

III

REPLY TO POINT III OF BRIEF IN OPPOSITION

Under Point III of the Brief in Opposition, the Respondent's attorneys attempt to demonstrate that the law relative to a newsman's privilege is clear and that there is no diversity of opinion, in *libel* cases. Petitioners again refer this Court to the *Ammerman*[1], *Dow Jones*[2] and *Caldero*[3] cases, on the one hand, as opposed to the *Hart*[4], *Mize*[5], *Carey*[6], *Goldfeld*[7] and *Rancho la Costa*[8] cases, on the other hand, all discussed at pages 24 to 27 of the original Petition, all of which are libel, or slander, cases.

---

[1]*Ammerman v. Hubbard Broadcasting, Inc.*, 91 N.M. 250, 572 P.2d 1258 (1977)

[2]*Dow Jones & Company, Inc. v. Superior Court*, 364 Mass. 317, 303 N.E.2d 847 (1973)

[3]*Caldero v. Tribune Pub. Co.*, 98 Idaho 288, 562 P.2d 791 (1977)

[4]*Hart v. Playboy Enterprises*, 4 Med. L. Rptr. 1616 (D. Kan., 1978)

[5]*Mize v. McGraw Hill*, 5 Med. L. Rptr. 1156 (S.D. Tex. 1979)

[6]*Carey v. Hume*, 492 F.2d 631 (D.C. Cir. 1974)

[7]*Goldfeld v. Post Publishing*, 4 Med. L. Rptr. 1167 (Conn Superior Ct., 1978)

[8]*Rancho la Costa v. Penthouse*, 4 Med. L. Rptr. 1564 (Cal. Superior Ct. 1978)

CONCLUSION

The issue of confidential sources is anything but moot in this case. The Trial Judge, backed by the 1978 *Ammerman* decision, decided by the Court of Appeals of New Mexico, in which certiorari was denied by the Supreme Court of New Mexico and the United States Supreme Court, has ruled that there is no newsman's confidential source privilege, absolute or conditional. The libel plaintiff continues to attempt to maneuver a default, for failure to reveal sources, or possible criminal contempt, as indicated by the discovery referred to in this brief, but chooses not to attempt to maneuver the actual entry of default or an actual contempt citation while this Petition still has breath.

The issue before this Court, in deciding the threshold question of whether to grant certiorari, is not whether the issue is "moot", but whether the "final judgment" rule presently precludes certiorari. The Petitioners respectfully urge that where the Trial Judge has unequivocally stated that no newsman's confidentiality privilege exists, where a decision of the highest court of the forum state supports that decision, where to continue to resist disclosure of sources under a claim of privilege conferred by the First Amendment to the Constitution of the United States risks criminal contempt or a default judgment, and where the decisions from the various other lower courts are in hopeless conflict on the issue of newsmen's confidential sources, the time and situation is ripe for the highest court of this land to step in and declare what the law is. Neither a news media litigant nor any litigant should be required to suffer a monstrous default judgment or a criminal contempt citation in order to obtain a clarification of the bare existence of a constitutional right, where lower courts are in utter disagreement as to the existence of that asserted constitutional right. A narrow exception to the "final judgment" rule, as here sought, will elevate, not denigrate, the rules of this Court, and is supported by precedent, logic and fundamental fairness.

Respectfully submitted,

ERIC D. LANPHERE
JOHNSON AND LANPHERE, P.C.
Attorneys for Petitioners
6400 Uptown Blvd. NE,
Suite 200 West
Albuquerque, New Mexico 87110

APPENDIX F

STATE OF NEW MEXICO

COUNTY OF BERNALILLO
IN THE DISTRICT COURT

WILLIAM C. MARCHIONDO,
Plaintiff,

vs. No. 6-75-02838

ROBERT A. BROWN, et al.,
Defendants.

ROBERT A. BROWN'S SUPPLEMENTAL ANSWERS TO INTERROGATORIES

COMES NOW, the defendant, Robert A. Brown, and as his Supplemental Answers to Interrogatories states:

QUESTION: 31. Attached hereto and to plaintiff's Complaint is a copy of an editorial entitled "Our Choice: Joseph Skeen," dated Sunday, November 3, 1974. With reference to said article, please answer the following questions:

d. Set forth in detail the source of sources of your information (including names and addresses of each source).

f. In this article, the statement is made that "primary election day money was delivered to Taos by Marchiondo's pilot. . . ." In reference to this statement, please state:

(1) The source of sources of your information, if any.

ANSWER: 31(d). For purposes of responding to this question I am assuming that name(s) are being requested. Don Devereaux, Phoenix, Arizona; names listed in Paragraph (b) previously answered; names listed in Robert A. Brown's Deposition.

ANSWER: 31(f)(1). Rena Rosequist.

QUESTION: 32. Attached is a copy of an article which appeared in the Albuquerque Journal, Saturday, March 26,

1977 entitled "Organized Crime Showing Interest in New Mexico." With reference to said article; please answer the following questions:

a. Who is responsible for the language contained in the article (if more than one person, please state the name of each person and their particular contribution to the article).

b. Set forth in detail the source or sources of your information (including names and addresses of each source).

c. The article states: "gangland figures are still wending their way into New Mexico from East and West. Some of those who have been in and out have established contacts with prominent figures close to the levers of power. Fast-buck artists have worked with and met with various attorneys, including some known to have political clout." Please set forth with particularity:

(1) The name and address of each "prominent figure" to whom you refer.

(2) The date of any such contacts and the names and addresses of each person present.

(3) The name and address of each of the "various attorneys" to whom you refer.

(4) The date of any alleged meetings between "Fast-buck artists" and any attorney named in your answer.

(5) The names and addresses of each person present at any alleged meeting between "various attorneys" and "Fast-buck artists."

(6) If in your answer to c.(1) and/or c.(3) above, Mr. Marchiondo is listed, please state with particularity all information you have which would indicate that Mr. Marchiondo is "close to the levers of power" or is "known to have political clout."

d. Included in the subject article of this interrogatory

is a photograph of William C. Marchiondo. In reference to that photograph, please state:

(1) The name of the person or persons responsible for placing the photograph in the newspaper and for its location in the newspaper.

(2) The name of the person or persons who has the obligation and responsibility of determining which photographs will be published and where each photograph will be placed.

(3) Was it the intention of the person who placed said photograph in this article to imply to the newspaper readers that Mr. Marchiondo was connected with organized crime? If your answer is yes, please state with particularity all facts upon which said person relied to establish that Mr. Marchiondo was allegedly connected with organized crime. If your answer is no, please state in detail each reason for publishing the picture and for its location.

(4) Was it the purpose of publishing this picture to malign and libel the plaintiff, William C. Marchiondo? If your answer is no, please state in detail each and every reason for publishing said picture.

e. For each and every answer given to Interrogatory 32, including the answer or answers to all sections and subsections, state in detail the name of each and every person or persons upon who you rely to establish the truth of every allegation contained in your answer and in the subject article.

ANSWER: 32. See T. H. Lang's answer to interrogatory #24, propounded to him.

QUESTION: 33. Do you know Don Devereaux? If so, please state:

a. How long you have known him.

b. What information, if any, he has ever given you regarding William C. Marchiondo, or any partner, associate,

or employee of the Marchiondo law firm, including any written documentation.

c. What information, if any, he has ever given you regarding any client of William C. Marchiondo or the Marchiondo law firm, including any written documentation.

d. How much money, if any, you have paid to Don Devereaux for any purpose.

ANSWER: 33. Yes

a. More than 10 years.

b. Don Devereaux has authorized me to release this information: Copy of letters purported to be from plaintiff to members of New Mexico Horsemen's Association and Pecos Valley Water Users Association; copy of Marchiondo & Berry balance sheet dated March 31, 1974 referencing a $5,000 loan to C. B. Trujillo.

c. See (b) above.

d. None.

QUESTION: 35. Do you know the publisher, editors, writers, or contributors of and to *Seer's Catalogue* or *Seers Rio Grande Weekly*? If so, please state:

a. The name, address, and position or title of each.

b. The length of time you have known each.

c. The amount of money, if any, which you have paid to each for any purpose.

d. Have you ever received any information from any one connected with *Seer's Catalogue* or *Seers Rio Grande Weekly* regarding the plaintiff? If so, please state:

(1) The date you received the information.

(2) The substance of the information, including copies of any written information supplied to you.

(3) The name and address of the person who supplied the information.

(4) The amount of money or other consideration, if any, you paid to the supplier of said information for any purpose.

ANSWER: See answer #33(b).

QUESTION: 54. List all reporters, investigators or other sources employed by you or known to you who have done research on William C. Marchiondo. For each such source, please state:

a. His or her name.

b. His or her employer and position.

c. His or her address and place of business.

d. His or her telephone number.

e. The dates of the investigations of William C. Marchiondo.

f. The types of research done on William C. Marchiondo.

g. Please submit copies of any work products submitted to you dealing with William C. Marchiondo.

h. If such work products have been destroyed, please include the circumstances of their destruction to include:

(1) Who destroyed it.

(2) How it was destroyed.

(3) Who ordered it destroyed.

(4) Where it was destroyed.

(5) Why it was destroyed.

i. If such work products were returned to the source, please state.

(1) Who the source was.

(2) When it was returned.

(3) Location of any copies returned.

(4) Where it was returned to.

(5) Address of person to whom it was returned.

(6) Why it was returned.

ANSWER: 54. See T. H. Lang's answer to interrogatory #46, propounded to him.

QUESTION: 61. Attached hereto is a copy of an article entitled "*For Judgeship* McBride Might Not Be Eligible" by Bob Brown, dated Thursday, December 26, 1974. This article states:

> "THE POLITICAL implications in McBride's appointment bother us, as does his having received financial support in at least one past election from well-known defense attorney, William C. Marchiondo."

In regard to this article, please answer the following question

b. Set forth in detail the source or sources of your information (including names and addresses of each source).

ANSWER: 61(b). None other than as set forth in Robert A. Brown's original Answers to Interrogatories #61(b).

. . . . . .

ROBERT A. BROWN

STATE OF NEW MEXICO)
) ss.
COUNTY OF BERNALILLO)

ROBERT A. BROWN, being first duly sworn, upon oath deposes and says: That he is one of the defendants in the above entitled matter; that he has read the foregoing Answers to Interrogatories and knows the contents thereof, and that the same are true to the best of his knowledge, information and belief.

. . . . . .

ROBERT A. BROWN

SUBSCRIBED AND SWORN to before me this 10th day of July, 1979.

.....
Notary Public

My Commission Expires:
Jan. 31, 1983

JOHNSON AND LANPHERE, P.C.

By .....
Attorneys for Defendants, Robert A. Brown, Albuquerque Publishing Company, Albuquerque Journal, Tom Lang, Jerry Crawford, Eric McCrossen
6400 Uptown Blvd. N.E.,
Suite 200 West
Albuquerque, New Mexico 87110
Phone: 881-3333

THIS WILL CERTIFY that on the 12th day of July, 1979 a true copy of the foregoing Supplemental Answers to Interrogatories were mailed to:

Ernesto Romero, Esq.
3602 Campus Blvd. N.E.
Albuquerque, New Mexico 87106

Jack Smith, Esq.
420 Lomas Blvd. N.W.
Albuquerque, New Mexico 87102

Lorenzo Tapia, Esq.
1805 Western Bank Building
505 Marquette, N.W.
Albuquerque, New Mexico 87102

Edmund J. Lang, Esq.
P. O. Box 1966
Albuquerque, New Mexico 87103

M. Terrence Revo, Esq.
3602 Campus Blvd. N.E.
Albuquerque, New Mexico 87106

John B. Tittmann, Esq.
P. O. Drawer AA
Albuquerque, New Mexico 87103

Thomas McKenna, Esq.
500 Citizens Bank Building
Albuquerque, New Mexico 87110

.....

APPENDIX G

STATE OF NEW MEXICO

COUNTY OF BERNALILLO
IN THE DISTRICT COURT

WILLIAM C. MARCHIONDO,
Plaintiff,

vs. No. 6-75-02838

ROBERT A. BROWN, et al.,
Defendants.

ROBERT A. BROWN'S SUPPLEMENTAL ANSWERS TO SECOND INTERROGATORIES

COMES NOW, defendant, Robert A. Brown, and as his Supplemental Answers to Second Interrogatories states:

QUESTION: 3. Please state the factual basis and sources of information of witnesses, public or confidential, if any, for the contention that on October 31, 1974, the Attorney General, David Norvell, interceded on behalf of convicted marijuana air smuggler, Roberto Burke, in an effort to get him a work travel permit allowing him to fly out of state for the law firm of Marchiondo & Berry.

ANSWER: 3. See attached Exhibit #1.

QUESTION: 4. Please state the factual basis and sources of information and witnesses, public or confidential, if any for your or the Journal's contention, that William C. Marchiondo sought to meet with Deputy U. S. Attorney General Harold Tyler about a Federal Grand Jury's subpoena of records from the Marchiondo & Berry Law Firm.

ANSWER: 4. See attached Exhibit #2.

QUESTION: 7. Please state where you obtained; from whom you obtained, and when you obtained a March 31, 1974 balance sheet of the Marchiondo & Berry Law Firm, and if you will do so without a motion to produce, please attach a true copy hereof to your answer.

ANSWER: 7. Don Devereaux has authorized me to release

this information: Don Devereaux; specific date unknown, however, it was received prior to November 3, 1974; See attached Exhibit #3.

.....
ROBERT A. BROWN

STATE OF NEW MEXICO)
) ss.
COUNTY OF BERNALILLO)

ROBERT A. BROWN, being first duly sworn, upon oath deposes and says: That he is one of the defendants in the above entitled matter; that he has read the foregoing Answers to Interrogatories and knows the contents thereof, and that the same are true to the best of his knowledge, information and belief.

.....
ROBERT A. BROWN

SUBSCRIBED AND SWORN to before me this 10th day of July, 1979.

.....
Notary Public

My Commission Expires:
Jan. 31, 1983

JOHNSON AND LANPHERE, P.C.

By .....
Attorneys for Defendants, Robert A. Brown, Albuquerque Publishing Company, Albuquerque Journal, Tom Lang, Jerry Crawford, Eric McCrossen
6400 Uptown Blvd. N.E.,
Suite 200 West
Albuquerque, New Mexico 87110
Phone: 881-3333

THIS WILL CERTIFY that on the 12th day of July, 1979 a true copy of the foregoing Supplemental Answers to Second Interrogatories was mailed to: Ernesto Romero, Esq., 3602 Campus Blvd. N.E., Albuquerque, N. M. 87106; Jack Smith, Esq., 420 Lomas Blvd. N.W., Albuquerque, N. M., 87102; Lorenzo Tapia, Esq., 1805 Western Bank Building, 505 Marquette, N.W., Albuquerque, N. M., 87102; Edmund J. Lang, Esq., P. O. Box 1966, Albuquerque, N. M., 87103; M. Terrence Revo, Esq., 3602 Campus Blvd. N.E., Albuquerque, N. M., 87106; John B. Tittman, Esq., P. O. Drawer AA, Albuquerque, N. M., 87103; Thomas McKenna, Esq., 500 Citizens Bank Bldg., Albuquerque, New Mexico, 87110.

.....

APPENDIX H

STATE OF NEW MEXICO

COUNTY OF BERNALILLO
IN THE DISTRICT COURT

WILLIAM C. MARCHIONDO,
Plaintiff,

vs. No. 6-75-02838

ROBERT A. BROWN, RALPH LOONEY, ALBUQUERQUE TRIBUNE, ALBUQUERQUE JOURNAL, THOMPSON H. LANG, ALBUQUERQUE PUBLISHING COMPANY (N.S.L.), JOURNAL PUBLISHING COMPANY, SCRIPPS-HOWARD PUBLISHING COMPANY, JOHN DOE I through X, JANE DOE I through XI,
Defendants.

WILLIAM C. HUMES SUPPLEMENTAL ANSWERS TO INTERROGATORIES

COMES NOW, William C. Hume, pursuant to Court's Order, and as his Supplemental Answers to Interrogatories states THAT:

QUESTION: 21. Do you know Don Devereaux? If so, please state:

a. How long you have known him.

b. What information, if any, he has ever given you regarding William C. Marchiondo or any partner, associate, or employee of the Marchiondo law firm, including any written documentation.

c. What informatoin, if any, he has ever given you regarding any client of William C. Marchiondo or the Marchiondo law firm, including any written documentation.

d. How much money, if any, you have paid to Don Devereaux for any purpose.

ANSWER: a. Approximately five or six years.

b. After consultation with Mr. Devereaux, and with his consent to reveal it, I have received items from Mr. Devereaux. I cannot remember the entire substance. Seers clips concerning Mr. Marchiordo and others, dealing with various aspects of his business dealings and his participation in and interaction with the political process and various politicians, were among the items. Also, memos and document copies, usually duplicates of information and documents published in Seers were sometimes included. I threw away many of these items after reading them. Some I passed on to my superiors, and some I placed in Journal files. None of them are under my personal control or custody.

c. I am not privy to the list of persons Mr. Marchiondo might have represented.

d. Mr. Devereaux has neither asked for nor received any payment, reimburement for expenses, or any other consideration from me; or to the best of my knowledge, from the Journal.

QUESTION: 23. Do you know the publisher, editors, writers, or contributors of and to *Seer's Catalogue* or *Seers Rio Grande Weekly*? If so, please state:

a. The name, address, and position or title of each.

b. The length of time you have known each.

c. The amount of money, if any, which you have paid to each for any purpose.

d. Have you ever received any information from any one in any way connected with *Seer's Catalogue* or *Seers Rio Grande Weekly* regarding the plaintiff. If so, please state:

(1) The date you received the information.

(2) The substance of the information, including copies of any written information supplied to you.

(3) The name and address of the person who supplied the information.

(4) The amount of money or other consideration, if any, you paid to the supplier of said information for any purpose.

ANSWER: Yes.

a. Don Devereaux, Phoenix area, Arizona. I am without knowledge as to his title, or other arrangements with Seers, except that I have seen his name as author on stories published in that newspaper. Also, see previous Answer to #26 signed on November 9, 1978.

b. See 21 a above.

c. See 21 d above.

d. See 21 b above.

.....

WILLIAM C. HUME

STATE OF NEW MEXICO)
) ss.
COUNTY OF BERNALILLO)

WILLIAM C. HUME, being first duly sworn, upon oath deposes and says: That he has read the foregoing Answer to Interrogatories and knows the contents thereof, and that the same are true to the best of his knowledge and belief.

.....

WILLIAM C. HUME

SUBSCRIBED AND SWORN TO before me this 18th day of June, 1979.

.....

Notary Public

My Commission Expires:
3/19/81

JOHNSON AND LANPHERE, P.C.

By .....
Attorneys for Defendants, Robert A. Brown, Journal Publishing Company, Albuquerque Publishing Company and Thompson H. Lang
6400 Uptown Blvd. N.E.,
Suite 200 West
Albuquerque, New Mexico 87110
881-3333

THIS WILL CERTIFY that on this 12th day of July, 1979, a copy of the foregoing Supplemental Answers to Interrogatories was mailed to the following:

Ernesto Romero, Esq.
3602 Campus Blvd. N.E.
Albuquerque, New Mexico 87106

Jack Smith, Esq.
420 Loma Blvd. N.W.
Albuquerque, New Mexico 87102

Lorenzo Tapia, Esq.
1805 Western Bank Building
505 Marquette, N.W.
Albuquerque, New Mexico 87102

Edmund J. Lang, Esq.
P. O. Box 1966
Albuquerque, New Mexico 87103

M. Terrence Revo, Esq.
3602 Campus Blvd. N.E.
Albuquerque, New Mexico 87106

John B. Tittmann, Esq.
P. O. Drawer AA
Albuquerque, New Mexico 87103

Thomas McKenna, Esq.
500 Citizens Bank Building
Albuquerque, New Mexico 87110

.....

APPENDIX I

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

No. 79-272

ROBERT A. BROWN, THOMPSON H. LANG, ALBUQUERQUE PUBLISHING COMPANY (N.S.L.) JOURNAL PUBLISHING COMPANY, a corporation, JERRY CRAWFORD and WILLIAM C. HUME,
Petitioners,

vs.

HON. RICHARD B. TRAUB,
District Judge,
Respondent.

AFFIDAVIT

STATE OF NEW MEXICO)
) ss.
COUNTY OF BERNALILLO)

WILLIAM C. HUME, being first duly sworn, deposes and says:

I am the same William C. Hume who appears as a Petitioner in the Petition for a Writ of Certiorari to the Supreme Court of the State of New Mexico, docketed in the Supreme Court of the United States as No. 79-272.

I was and have been employed as a newspaper reporter for the Albuquerque Journal, the newspaper published by co-Petitioner Journal Publishing Company on, and before, October 27, 1974, and up to the present date.

During the aforementioned period of time I have engaged in investigations of background information relative

to William C. Marchiondo, plaintiff in the underlying libel action. During the course of such investigation I have received information concerning Mr. William C. Marchiondo from sources who have specifically asked that I not reveal their identity, and I have so agreed. I have also received information from many other types of sources, including sources who did not request confidentiality. One confidential source was a Don Devereaux. However, with regard to Mr. Don Devereaux, I obtained from him, prior to revealing him as a confidential source in my supplemental answers to interrogatories which I filed with the trial court on July 13, 1979, a specific release from my promise of confidentiality, and specific consent that he could be revealed as a confidential source.

I have no other confidential sources who furnished me with information concerning Mr. William C. Marchiondo prior to March 26, 1977, the date that the last publication which Mr. Marchiondo alleges in his libel action to be libelous, was published. However, I do have additional confidential sources who have provided me with information concerning Mr. William C. Marchiondo subsequent to March 26, 1977.

On repeated occasions, during the course of my oral deposition being taken in the libel action in question, plaintiff's attorneys have asked for source information, which if revealed would lead to or tend to lead to divulging a confidential source. My attorneys have instructed me not to answer any questions concerning information I have obtained subsequent to March 26, 1977, and I have in fact refused to answer, on the following multiple grounds:

(1) Information concerning the identity of sources is privileged.

(2) Information obtained after March 26, 1977 is protected by the attorney work product doctrine.

(3) Information obtained by me subsequent to March 26, 1977 is an attorney-client communication and is,

therefore, privileged as an attorney-client communication.

As recently as Friday, November 16, 1979, plaintiff's attorneys have indicated that they would file a motion to compel answers to all questions I was directed not to answer at my deposition, but, to my knowledge, they have not yet filed such a motion.

For months there has been a motion filed by plaintiff below to join me as a defendant to the libel action; plaintiff's attorneys have not as yet argued that motion to the trial court and I am aware that my attorneys will resist that motion.

I will not reveal a confidential source to plaintiff or his attorneys if ordered by the trial court to do so. I consider it of the utmost importance to my profession as a newspaper reporter that I have access to information from persons who plead for anonymity, and that my effectiveness in gathering information would be tremendously impaired if I were, under the law of this land, not able to promise confidentiality.

I restate that I have no confidential sources to protect who furnished information to me relative to William C. Marchiondo prior to March 26, 1977; I do have confidential sources whom I feel I must protect who furnished information to me subsequent to March 26, 1977, concerning William C. Marchiondo.

At my deposition, the portion of which was taken on August 20, 1979, Mr. Ernesto Romero, one of the attorneys for plaintiff, in addition to asking me about any sources of my information concerning Mr. William C. Marchiondo, asked me specifically if I had received information from sources connected with the following listed governmental agencies or bodies: United States Attorney of New Mexico, United States Attorney for New York, United States Attorney for Colorado, United States Attorney for Nevada, Department of Justice (Washington, Louisiana, California),

the Federal Bureau of Investigation, the New Mexico State Police, the (New Mexico) Governor's Organized Crime Commission, the Albuquerque, New Mexico, Police Department, the New Mexico Attorney General's Office, and the Nevada Gaming Control Commission.

It is apparent to me that Mr. Romero does not consider my revealing or refusing to reveal confidential sources is a moot question.

.....

WILLIAM C. HUME

SUBSCRIBED AND SWORN TO before me this .... day of November, 1979.

.....

Notary Public

My Commission Expires:

.....

APPENDIX J

STATE OF NEW MEXICO

COUNTY OF BERNALILLO
IN THE DISTRICT COURT

WILLIAM C. MARCHIONDO,
Plaintiff,

vs. No. CV 75-02838

ROBERT A. BROWN, et al,
Defendants.

MOTION TO COMPEL ANSWERS TO ORAL DEPOSITION OF GERALD J. CRAWFORD

COMES NOW, Plaintiff, by and through his attorneys, Jack Smith, Esq. and Romero & Revo, P.A. by and pursuant to Rule 37, New Mexico Rules of Civil Procedure, to move the Court for an order empelling defendant Gerald J. Crawford to fully answer certain questions propounded to him at his oral deposition and as grounds therefore states:

1. On August 31, 1979, Gerald J. Crawford appeared at the offices of Helen Cordova, CSR, pursuant to Notice of Deposition and Subpoena.

2. The following questions were asked and the deponent refused to answer or was instructed not to answer by his attorney, Mr. James Dines, who was in attendance at the deposition. For purposes of assisting the Court in reviewing the specific questions, movant has attached as Exhibit "A" pages 122, 123 and 131 of Gerald J. Crawford's deposition. The specific questions and responses have been underlined for the Court's convenience. The citations for these specific questions and responses are as follows:

P. 122, lines 23-25

P. 123, lines 1-3

P. 131, lines 15-18.

3. The refusals to answer and the instructions not to answer were without substantial justification or legal basis.

4. The questions were asked to elicit testimony which appeared reasonably calculated to lead to the discovery of evidence admissable pursuant to Rule 26, New Mexico Rules of Civil Procedure.

5. Under the premises, the plaintiff has suffered substantial prejudice, delay and expense.

WHEREFORE, plaintiff prays for an Order of this Court compelling Gerald J. Crawford to answer fully the listed questions, for attorneys' fees incurred in obtaining this Order, and for such other and further relief as to the Court may seem just and proper under the circumstances.

Respectfully submitted,
JACK SMITH, Esq.
ROMERO & REVO, P.A.

By: .....
ERNESTO J. ROMERO
Attorneys for Plaintiff
3602 Campus Blvd., NE
Albuquerque, New Mexico 87106
Telephone: (505) 262-2131

CERTIFICATE

I certify that I did mail to opposing counsel the foregoing pleading on this 19th day of October, 1979.

.....
ERNESTO J. ROMERO

Exhibit A

that they were gambling.

Q Do you know what basis the IRE had to say that the picture showed the Plaintiff and Senator Sego gambling?

A No.

Q Did you ever seek to find out?

A There may have been an attempt to find out, yes.

Q Can you describe that attempt?

(A short discussion was held between counsel and the witness.)

MR. DINES: I think the question was the effort about trying to find out?

MR. ROMERO: Why don't you read the last question.
(The last question was read.)

THE WITNESS: Well, to begin with, I said I think there was an attempt.

(By Mr. Romero) Do you know whether there was an attempt?

A No, I don't.

Q Did you make any attempt to find out?

A No.

Q So this notion, if it was held by anyone, that the Plaintiff was gambling in the photograph, which showed the Plaintiff and Senator Sego and some other gentleman who is obscured in the

face, is an inference, so far as you were concerned?

MR. DINES: I'm going to instruct the witness not to answer the question. It is ambiguous because I don't know if it's an inference by IRE or what. The picture was never publicized or printed indicating gambling. There was no cut line or anything in the story that ever indicated gambling and, therefore — am I misunderstanding counsel's question?

Q (By Mr. Romero) Is the question confusing to you, Mr. Crawford?

A Yes, it sure is.

Q Is the photograph that was printed in Exhibit Number 231 sliced or divided in any way from another photograph?

A This one?

Q Of the Plaintiff.

A Yes.

Q It was?

A Yes.

Q And what photograph was it divided from?

A This photograph was - -

MR. DINES: In Number 231.

THE WITNESS: - - in Number 231, was part of a collage of photographs that we received from the IRE. The other part of this particular print — actually, it's not a photograph. It's a print. The other part of that was of some individual who was a subject of another IRE story.

A No

Q Nobody expressed that?

A No.

MR. DINES: If, in fact, there was such a concern, which there are no facts.

THE WITNESS: There's nothing in the story that says that.

MR. DINES: There's nothing in the record, so far, to establish that innuendo.

Q (By Mr. Romer) So nobody even brought it up in the news conference, that you can remember?

A No.

MR. ROMERO: Gentlemen, I indicated yesterday that we would terminate this Deposition, for accomodation purposes, at 12:00 Noon, and I am going to go ahead and meet my part of the bargain. You indicated, I believe, Mr. Dines, that you would instruct Mr. Crawford, today, not to answer

any questions as to sources, so forth, subsequent to 3/26/77; is that correct?

MR. DINES: That's correct.

MR. ROMERO: And that's the reason I haven't inquired into that and we will get that resolved in the interim. We had discussed a continuation of this Deposition on either the 10th or 11th of September or the 13th.

MR. DINES: The 10th or the 13th for continuation of Bill Hume. I'm still waiting to hear from him as to that day.

MR. ROMERO: We will just have to resume this Deposition

STATE OF NEW MEXICO
COUNTY OF BERNALILLO
IN THE DISTRICT COURT

WILLIAM C. MARCHIONDO,
Plaintiff,

vs. No. CV-75-02838

ROBERT BROWN, ET. AL.,
Defendants.

REQUEST FOR HEARING

1. Jury X Non-Jury.....

2. Judge to Whom assigned: Hon. Richard B. Traub

3. Disqualified Judges: N/A

4. Specific Matters to be heard: Motion to Compel ANSWERS To Oral Deposition of Gerald J. Crawford

5. Estimated time requested for hearing all parties and witnesses: 1 hour.

6. Date Pre-Trial order filed or dates of pre-trial conference:

7. Names, addresses and telephone numbers of all counsel or parties pro so entitled to notice:

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Ernesto J. Romero
Attorney for Plaintiff

NOTICE OF HEARING

The above matter(s) will be heard before the Honorable Richard B. Traub, at the Bernalillo County Courthouse at 9:00 A.M., on December 19, 1979, with 1 hour allocated for hearing.

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s/Heather Brandt
CALANDER CLERK

Notice mailed: 10/22/79

By: H. Brandt